Description of document:	Records related to eight (8) specific Federal Trade Commission (FTC) Office of Inspector General (OIG) investigations, 2013
Request date:	26-June-2014
Released date:	28-July-2014
Posted date:	22-September-2014
Note:	Records related to these investigations included: 12-162, 12-164, 12-165, 12-166, 12-168, 13-170, 13-171, and 14-172
Source of document:	Freedom of Information Act Request Office of General Counsel Federal Trade Commission 600 Pennsylvania Ave., N.W. Washington, D.C. 20580 Fax: (202) 326-2477 Email: FOIA@FTC.GOV

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

JUL 28 2014

Re: FOIA-2014-01078
OIG Investigations

This is in response to your request dated June 26, 2014, under the Freedom of Information Act seeking access to documents relating to FTC OIG investigations 12-162, 12-164, 12-165, 12-166, 12-168, 13-170, 13-171, and 14-172. In accordance with the FOIA and agency policy, we have searched our records as of June 27, 2014, the date we received your request in our FOIA office.

We have located 78 pages of responsive records. I am granting partial access to the accessible records. Portions of these pages fall within the exemptions to the FOIA's disclosure requirements, as explained below.

Some responsive records are exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3), because they are exempt from disclosure by another statute. Specifically, The Procurement Integrity Act protects from disclosure "contractor bid or proposal information or source selection information before the award of a Federal agency contract to which the information relates." 41 U.S.C. § 423(a)(1); *Legal and Safety Employer Research v. Army,* 2001 WL 34098652 (E.D.Cal.).

Some responsive records contain staff analyses, opinions, and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5.5 U.S.C. § 552(b)(5). *See NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132 (1975). Additionally, some records contain information prepared by an attorney in contemplation of litigation which is exempt under the attorney work-product privilege. *See Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947).

Some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information.

Some of the records were obtained on the condition that the agency keep the source of the information confidential and are exempt from disclosure under FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D). That exemption is intended to ensure that "confidential sources are not lost

because of retaliation against the sources for past disclosures or because of the sources' fear of future disclosures." *Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262* (7th Cir. 1985).

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington D.C. 20580, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Dione J. Stearns
Assistant General Counsel

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

July 9, 2013

The Honorable Darrell Issa, Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Issa:

Per your request, attached is the report of investigation into leaks of nonpublic information shared with the media during the Federal Trade Commission's (FTC) investigation of Google. Due to the scope of the investigation and the resources necessary to complete it, the FTC Office of Inspector General (OIG) requested that the United States Postal Service (USPS) OIG conduct the investigation on our behalf. The investigation focused on whether any FTC commissioner, employee or contractor disclosed nonpublic information to the public or the media about the agency's investigation of Google.

The investigation did not identify the person(s) who disclosed nonpublic information to the media. During the course of the investigation, however, the USPS OIG identified risks in FTC policies and business practices that impacted the OIG's ability to narrow the list of internal sources potentially responsible for the nonpublic disclosures and made the FTC susceptible to leaks. The Commission will receive copies of the report of investigation and will be asked to provide actions it plans to take to address these risks. We will send you a copy of the Commission's response when we receive it.

If you or your staff have any questions about the report, please contact me at 202-326-3527 or by email at swilson1@ftc.gov.

Sincerely,

Scott E. Wilson
Inspector General

cc: The Honorable Elijah Cummings, Ranking Minority Member

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

July 9, 2013

TO: Chairwoman Edith Ramirez
Commissioner Julie Brill
Commissioner Maureen K. Ohlhausen
Commissioner Joshua D. Wright

FROM: Scott E. Wilson
Inspector General

SUBJECT: Leaks of Nonpublic Information During the Google Investigation

Attached is the report of investigation into leaks of nonpublic information during the FTC's investigation of Google. We conducted this investigation at the request of Chairman Darrell Issa, House Committee on Oversight and Government Reform. Due to the scope of this investigation and the resources necessary to complete it, my office entered into an agreement with the United States Postal Service (USPS) OIG to conduct the investigation on our behalf.

The investigation did not identify the person(s) who disclosed nonpublic information. However, during the course of the investigation, the USPS OIG identified risks in FTC policies and business practices that made the FTC susceptible to disclosure of nonpublic information. These policies and procedures also impacted the OIG's ability to narrow the list of internal sources potentially responsible for the nonpublic disclosures.

By August 9, 2013, please provide any actions the Commission has taken or plans to take to address these risks. We will forward a copy of the Commission's response to Chairman Issa.

If you have questions, please contact me at 202-326-3787 or by email at swilson1@ftc.gov. Thank you for your cooperation during this investigation.

UNITED STATES POSTAL SERVICE
OFFICE OF INSPECTOR GENERAL
1735 NORTH LYNN STREET
ARLINGTON, VA 22209-2020

July 8, 2013

MEMORANDUM FOR INSPECTOR GENERAL SCOTT WILSON, FEDERAL TRADE COMMISSION

FROM: William R. Siemer
Assistant Inspector General for Investigations

SUBJECT: Report of Investigation – Unauthorized Disclosure

On February 20, 2013, you signed a Memorandum of Understanding (MOU) with the Postal Service Office of Inspector General to investigate allegations concerning unauthorized disclosure of nonpublic information by Federal Trade Commission personnel or contractors.

Per the MOU, attached are the original Report of Investigation and five copies in this matter. If you have any questions concerning this investigation, please contact me at (703) 248-2229.

Attachments

UNITED STATES POSTAL SERVICE
OFFICE OF INSPECTOR GENERAL

CASE #: 13UIHQ0047GC26SI **CROSS REFERENCE #:**

TITLE: MISCONDUCT – FEDERAL TRADE COMMISSION, WASHINGTON, DC 20580

CASE AGENT (if different from prepared by):

REPORT OF INVESTIGATION

PERIOD COVERED: FROM February 14, 2013 **TO** May 24, 2013

DISTRIBUTION:

Scott Wilson
Inspector General
Federal Trade Commission
Office of Inspector General
Room 1110
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

PREPARED BY: SPECIAL AGENT MATTHEW D. HARRIS	DATE: 5/24/2013

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I. PREDICATION

In a letter dated January 3, 2013, Chairman Darryl Issa, House Committee on Oversight and Government Reform, requested that the Federal Trade Commission (FTC) Office of Inspector General (OIG) initiate an investigation, to determine whether the Commission or its employees, shared nonpublic information with the public or the media about the FTC investigation of Google.

In his letter, Chairman Issa stated that throughout the FTC's investigation of whether Google violated the Federal Trade Commission Act, nonpublic information about the developments in the investigation was inappropriately shared with the media. Chairman Issa opined in his letter that the FTC contributed to or was the source of the released information and that those "leaks" were prohibited by law and counterproductive to the investigative process. Chairman Issa requested that FTC IG Scott Wilson investigate the source of the leaks as well as determine the depth of nonpublic information disclosed to the media.

After receiving Chairman Issa's request, IG Wilson requested that the U.S. Postal Service OIG assist in conducting the investigation concerning the unauthorized disclosure of nonpublic information by FTC personnel or contractors. On February 20, 2013, the FTC OIG and Postal Service OIG entered into a Memorandum of Understanding (MOU) under the authority of Section 6(a)(3) of the Inspector General Act, 5 U.S.C. App. 3, which allowed the Postal Service OIG to join this investigation.

II. SYNOPSIS

This investigation focused on whether any FTC commissioner, employee or contractor disclosed nonpublic information to the public or the media about the agency's investigation of Google. The investigation included interviews of FTC employees as well as analyses of FTC's telephonic, written, electronic, and computer records. Investigators compared this information to all media articles related to the Google investigation. They focused particularly on disclosures that pertained to potential charges the FTC might bring against Google and settlement discussions between the FTC and Google. The investigation did not uncover the identity of the person(s) who disclosed information that was clearly confidential and nonpublic to the media. However, the investigation disclosed that there were many potential sources of information, both inside and outside of the FTC that could have formed a basis for the various news reports.

During this investigation, the OIG identified risks in FTC policies, regulations and business practices that created an environment which made the FTC highly susceptible

to disclosure of nonpublic information. These policies and procedures impacted the OIG's ability to narrow the list of internal sources potentially responsible for the nonpublic disclosures, as noted below.

- The FTC's Office of Public Affairs (OPA) has the primary responsibility for informing the media of any Commission actions. However, FTC policy allows for communications between the staff and representatives of the media regarding matters of public record. The policy states that it is often "advantageous to explain to the media representatives the technical aspects of the Commission's procedures, including the contents and effect of complaints and orders, trade regulation rules..." which enables the media to report the FTC's "actions with greater accuracy." The OIG's analysis of electronic and telephonic records confirmed that many FTC employees had frequent contact with members of the media outside of OPA. This frequent contact may have allowed members of the media to solicit information from a variety of internal sources, some of who were not formally trained to deal with these types of inquiries and could have inadvertently disclosed nonpublic information.

- The FTC has an ongoing business practice to make the FTC's closed door commission meetings accessible to all of its employees, both in the headquarters office where the meetings are held and via videoconference to employees in other locations. This business practice increases the risk of disclosing nonpublic confidential information. It is a best practice to make sensitive information available only on a need to know basis in order to ensure the integrity of an investigation. Investigators determined that nonpublic information related to FTC's investigations, including the Google investigation, was discussed in these open meetings. Furthermore, key documents related to ongoing investigations, including the investigation of Google, were stored on FTC network storage that was accessible to all employees. This broad access to sensitive information made it virtually impossible for investigators to identify likely sources of leaks to the media.

- In 2003, the FTC implemented a 45-day auto-deletion policy for all un-archived email. In a memorandum dated March 12, 2012, the FTC's Principal Deputy General Counsel recommended to Chairman Jonathan Leibowitz that the FTC continue its email auto-delete policy. The original decision to implement this process noted, "the agency had been needlessly saving many thousands of emails that should have been destroyed, all of which are potentially subject to the Freedom of Information Act and discovery requests that could cost the agency substantial resources to locate and review, if requested." The solution of automatically deleting emails over 45 days old relied on the diligence of

employees to archive important agency records. The auto-delete policy could have led to the automated deletion of important agency documents or correspondence if employees did not manually archive those files. It is unlikely that any employee(s) leaking information would have saved emails related to their disclosures and valuable evidence has likely been lost as the system routinely destroyed email records. The policy limited the OIG's ability to review emails unless the emails were less than 45 days old or the employees archived the emails on their workstations. The policy may also limit any future OIG investigation.

During the course of the OIG's case, investigators determined that there was a difference in perspective among the commissioners regarding nonpublic information and what could be shared with the media. All but one of the FTC's current commissioners, as well as the former chairman, indicated they were prohibited from speaking with the media about their internal deliberations, thoughts, or concerns in an active investigation. Their perspective was in contrast to one commissioner who told investigators that it was permissible to disclose personal deliberations and thoughts to the media, and likely did share personal thoughts about the Google investigation with the media. Although investigators could not identify the specific source of information for any particular media article, any disclosures about the commissioners' internal deliberations or personal thoughts may have provided reporters the opportunity to speculate about the FTC's investigative direction in the Google investigation and include that information in their publications.

Finally, investigators determined the FTC interviewed and deposed more than 100 witnesses over its nearly 20-month investigation of Google. The FTC also served over 20 subpoenas to Google competitors. While FTC attorneys advised interviewees that the content of interviews and depositions were nonpublic, interviewees had no obligation to protect information they received from the FTC, and any of these individuals could have shared their knowledge of the investigation with the media. Additionally, state Attorneys General, their employees and members of the European Union (EU) received frequent comprehensive briefings on the Google investigation. Commissioners also frequently met with third parties and often disclosed their opinions on the FTC's Google investigation. The OIG could only conclude that, due to the numerous sources outside the FTC which had access to nonpublic information, it was possible that some of the disclosures to the media could have come from sources outside the FTC.

III. BACKGROUND

Federal Trade Commission (FTC)

The FTC was created in 1914 and has the mission "to prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity." The Federal Trade Commission as it came to be called is led by five commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. The President chooses one Commissioner to act as Chairman.

Current FTC Commissioners –

- Chairwoman Edith Ramirez (sworn in on April 5, 2010 – expires September 25, 2015) (designated to serve as Chairwoman effective March 4, 2013)
- The Honorable Julie Brill (sworn in on April 6, 2010 – expires September 25, 2016)
- The Honorable Maureen K. Ohlhausen (sworn in on April 4, 2012 – expires September 2018)
- The Honorable Joshua D. Wright (sworn in on January 11, 2013 – expires September 2019)
- There is currently one Commissioner vacancy which was formerly held by The Honorable J. Thomas Rosch

Former Chairman Jonathan David Leibowitz was sworn in on September 3, 2004, and resigned February 15, 2013.

FTC Bureau of Competition

The FTC's Bureau of Competition is the antitrust arm of the organization. The Anticompetitive Practices Division, which falls under the Bureau, conducted the investigation of Google.

This Bureau's mission is to prevent anticompetitive mergers and other anticompetitive business practices in the marketplace. By protecting competition, the Bureau promotes consumers' freedom to choose goods and services in an open marketplace at a price and quality that fits their needs and fosters opportunity for businesses by ensuring a level playing field among competitors.

Anticompetitive Practices Division (ACP) – The ACP Division focuses on enforcement efforts against anticompetitive conduct in industries other than healthcare and pharmaceuticals.

FTC's Investigation of Google

Google is headquartered in Mountain View, CA. It is a publically traded global technology company. Google is listed under the symbol (GOOG) on the New York Stock Exchange (NYSE).

On June 13, 2011, the FTC initiated a full investigation (referred to as a "compulsory process") to determine whether Google engaged in anticompetitive practices with respect to its online search, online advertisement, and mobile phone businesses. Other organizations conducting parallel investigations included the European Commission (EC), and the States of Texas, New York, California, Ohio, and Oklahoma. Several private lawsuits pertaining to the same issues were also brought against Google at the same time.

In August 2012, the ACP division recommended to the FTC's Commissioners, that the FTC litigate its case against Google and asked the Commission to issue a civil complaint, which concluded that:

1. Google unlawfully "scraped" or appropriated content from rival websites in violation of Section 2 of the Sherman Act and Section 5 of the FTC Act [AGENT NOTE: The FTC's Bureau of Economics describes "scraping" as the misappropriation of content which includes taking information from competitor's websites and using it as original content]

2. Google's contractual restrictions prevented advertisers from managing advertising campaigns across several ad platforms in violation of Section 2 of the Sherman Act and

3. Google's exclusionary agreements to provide syndicated search services to web publishers violated Section 2 of the Sherman Act

In a letter dated December 27, 2012, Google Senior Vice President of Corporate Development and Chief Legal Officer David Drummond informed Chairman Leibowitz that Google would agree to commitments in return for the closing of the FTC's investigation.

On January 3, 2013, the FTC publically announced it had reached a two-part settlement and entered into a Consent Decree with Google. Google agreed to change some of its business practices in order to resolve the FTC's concerns that those practices could stifle competition in the markets for popular devices such as smart phones, tablets and gaming consoles, as well as the market for online search advertising.

Under the settlement, Google agreed to refrain from certain business practices relating to its search and search advertising business. Google agreed to refrain from misappropriating the content of its rivals for use in its own specialized search results. Google also agreed to drop contractual restrictions that may have impaired the ability of small businesses to advertise on competing search advertising platforms.

Under the Consent Decree, Google is prohibited from seeking injunctions or exclusion orders against willing licensees of its standard-essential patents.

2012 Congressional Letters

Between November 19, 2012, and December 12, 2012, Senator Ronald Wyden, Senator Dianne Feinstein, House Energy and Commerce Ranking Member Anna G. Eshoo, and House Judiciary Committee Member Zoe Lofgren sent letters to Chairman Leibowitz expressing concerns about "leaks" to the media.

On December 10, 2012, Chairman Issa sent a letter to Chairman Leibowitz stating a concern that the FTC "appears to be putting its ambitions ahead of a responsible and measured use of its Section 5 authority...the media should not be used to advance such bureaucratic goals. It appears that some in the agency, in violation of Commission policy, have leaked information about an ongoing investigation and a possible use of the Commission's Section 5 authority." [AGENT NOTE: Section 5 of the FTC Act prohibits "unfair methods of competition." See 15 U.S.C §§41-58 (1994)]

FTC Response to Congressional Letters

In response to the Congressional inquiries, Chairman Leibowitz sent letters to each Congressional member who voiced their concern about the release of nonpublic information to the media. In the responses, Leibowitz referenced a November 29, 2012, memorandum he addressed to "Commissioners and Commission staff," explaining that he was "very troubled" by the allegations that the "leaks" were coming from the FTC. In the memorandum, Leibowitz explained that he did not believe anyone at the Commission was responsible for the "leaks," and said;

> "I want to remind everyone that we need to be extremely careful about what we say to outside parties and about what we say to our colleagues when we are in places (including places in the FTC buildings) where we might be overheard by members of the public. Put simply, this agency, and federal law, do not tolerate leaks."

FTC policy on public information

The FTC makes information available for public inspection and copying by placing it on the public record. FTC statutes and policies define certain information as nonpublic and prohibited from unauthorized release. Nonpublic information includes any information related to on-going investigations. An FTC employee's unauthorized disclosure of confidential information obtained from witnesses or subjects, is a misdemeanor offense under 15 U.S.C. § 50.

IV. DETAILS

Allegation: FTC employees or contractors disclosed nonpublic information to the public or the media about the FTC's investigation of Google.

Findings:

Analysis of media articles containing nonpublic information related to the investigation of Google

Over the course of the FTC's investigation, nonpublic information was disclosed to several media outlets. The nonpublic disclosures often revealed internal deliberations and positions of the FTC's Commissioners and what legal action, if any, the FTC was prepared to take against Google. Some examples of these disclosures include:

- A media report in October 2011 credited "people close to the matter" with providing information about the FTC "peppering the company's legal eagles with questions...."
- In August 2012, a reporter credited "four people familiar with the matter...who spoke on the condition of anonymity because the progress of the probe is confidential" with saying the FTC was poised to finish the Google antitrust probe in weeks.

In the fall of 2012, toward the culmination of the FTC's investigation of Google, media coverage of the FTC investigation became more frequent. Between September 10, 2012 and December 13, 2012, over 22 published articles reviewed by the OIG contained information that appeared to include nonpublic disclosures. In many of these articles, internal FTC discussions and deliberations were disclosed to the media. While many of the media accounts were inaccurate, some reports relayed precise events and information which, according to two witnesses, likely would have only been known by FTC employees.

Analysis of possible FTC sources of nonpublic information

The OIG identified publically available news articles which contained nonpublic information and some of which identified an FTC employee as the source of the information in the article. These articles generally surrounded the proposed settlement negotiations between the FTC and Google. For example, a September 20, 2012, New York Post article quoted a source close to Chairman Leibowitz and noted the FTC and Google were close to a settlement. Many of the disclosures divulged negotiation tactics and internal FTC discussions, such as each Commissioner's viewpoint of whether the FTC should sue Google and whether the FTC had sufficient evidence to pursue such a case. An October 12, 2012 New York Times article noted that the FTC was preparing a memo consisting of over one-hundred pages, recommending that the FTC sue Google. The article cited the information regarding the memo as coming from "two people briefed on the inquiry," and from sources who "spoke on the condition that they not be identified."

Several of the articles containing nonpublic information referred to an "FTC attorney," or "sources within the FTC." A November 14, 2012, MLex article noted that the FTC was continuing to establish certain aspects of the investigation, and cited two FTC attorneys as their sources. The same article identified one of the components of the FTC case against Google as an issue regarding smartphone patents. The article cited "FTC attorneys" as its sources and stated the FTC had a reasonably solid case against Google on the issue of the compatibility of Google's application programming interface (API) with other online advertising platforms and "scraping," which involves the uncompensated use of key information from other online sources, such as customer review sites.

Summary of Employee Interviews

During the course of the OIG investigation, investigators interviewed FTC managers and employees within the FTC's Bureau of Competition. All of the employees denied any knowledge of any commissioner, employee or contractor who may have disclosed nonpublic information to the media. The employees did not have first-hand knowledge of those responsible for the disclosures, nor were they able to provide any first-hand information regarding the origin of the disclosures. Generally, the employees believed the disclosures originated from sources outside of the FTC.

During the interviews, all of the individuals generally expressed concern about the nonpublic disclosures and how they were "embarrassing both personally and professionally to the Commission and to its employees." The interviewees surmised that the disclosures were likely the result of too many people having access to nonpublic

information and documents. Because numerous sources inside and outside the FTC were privy to Google investigative information, employees told OIG agents that the disclosures could have come from a variety of sources. Employees explained that Attorneys General (AGs) from five states signed access agreements with the FTC, (because the states had active investigations of Google) and had access to nonpublic information. The EU also had open investigations of Google, and FTC employees stated that they often briefed both the EU and the AGs on the status of the FTC's Google investigation.

The employees stated that the disclosures could have also been made by third parties who gained information as a result of being interviewed or deposed by FTC attorneys. Employees told OIG investigators that over 100 people were interviewed or deposed. These employees admitted that nonpublic information was shared with these parties. They explained that third parties have no obligation to protect information they receive from the FTC; therefore, employees believed it was likely that the nonpublic disclosures may have also come from these third parties. One FTC employee said that based on the timing of the nonpublic disclosures, they were certain that the disclosures were coming from one of the parties who claimed to be harmed by Google's business practices [AGENT NOTE: The FTC employee who provided this information explained that once the media received the information that the FTC was not going to pursue a search bias case against Google, the affected company began an aggressive campaign to discredit the FTC by disclosing its settlement discussions to the media.]

When describing the nonpublic disclosures cited by the media as coming from the FTC, employees explained the disclosures may not have been intentional, but were rather the result of diligent reporting on behalf of the journalists. Two FTC employees explained that, during the course of the FTC's Google investigation, antitrust reporters contacted them and asked them to provide details about the investigation that they were prohibited from disclosing. One employee described the reporter's tactic as attempting to "trick" the employee into disclosing a detail that was nonpublic.

Employees told OIG investigators that the FTC's closed door commission meetings were open to all FTC employees. One employee explained that Google was often the topic of interest during these meetings. The employee said the meetings were "packed" with FTC employees, including those outside the ACP division. These meetings often divulged the FTC's position on the facts and evidence in the Google investigation.

The FTC also held separate meetings on the Google investigation, which were generally limited to ACP employees. During these meetings, FTC attorneys discussed the results of their interviews and depositions of witnesses. During one of these meetings, an FTC employee expressed concern that it appeared during the interviews

and depositions of third parties that FTC attorneys were divulging too much information to the third parties. The employee told investigators his concern appeared to be unwelcomed. The employee who voiced this concern believed third parties were responsible for the disclosure of nonpublic information.

Summary of Interviews of FTC Commissioners

During the course of the investigation, OIG investigators interviewed former Chairman Leibowitz, current Chairwoman Edith Ramirez, Commissioners Julie Brill and Maureen Ohlhausen, and former Commissioner Thomas Rosch. The commissioners all denied having knowledge of any FTC employee or contractor who may have disclosed nonpublic information to the media. Generally, the commissioners believed the disclosures originated from sources outside of the FTC. However, some commissioners believed FTC personnel could have also been responsible for the disclosures.

Some commissioners disclosed that they commonly spoke with the media as a general business practice. They felt it was advantageous for the FTC in general and the commissioners in particular to develop a strong relationship with the media. Most commissioners noted it was generally good policy to develop media relationships as it helped to advance the FTC's agenda. The commissioners also believed that allowing FTC employees the ability to attend Commission meetings was beneficial for morale and esprit de corps. Most of the commissioners said that, during the Google investigation, they were inundated with daily media requests for interviews and information to a much greater extent than for any previous investigation. One of the commissioners described being "hounded" by the media, and another noted that the press had an "insatiable" appetite for the story.

During any conversations with the media, all of the commissioners said they were exceedingly cautious not to divulge any information the FTC considered to be nonpublic. Four commissioners said they would not and did not share their opinions or forecast how they were going to vote on the investigation with the media before the final vote was taken. These commissioners explained that a commissioner should not discuss where he or she stands on an issue with the media, as it could allow a diligent reporter to piece information together and forecast the Commission's final decision.

During the interviews, one of the commissioners appeared to have a different perspective about nonpublic information compared to the other four commissioners. The commissioner believed that the individual commissioners' thought processes and personal deliberations with regards to on-going investigations were not considered non-public information. The commissioner explained that it was permissible to provide the media an insight into their personal deliberations and thoughts on an investigation as

long as commissioners were not disclosing information obtained through any compulsory process. This commissioner indicated they received guidance from someone in the FTC's Office of General Counsel (OGC) that a discussion of a commissioner's personal deliberations to the media during an investigation was allowed. That commissioner told investigators they likely did share their thoughts and personal deliberations about the Google investigation with the media, but the commissioner did not believe that doing so divulged nonpublic information to the media and they denied being a source of the leaks.

Additionally, the commissioners explained it was permissible to provide third parties information about their internal deliberations, thought processes, and concerns in an investigation. They explained the commissioners have an obligation to inform third parties of the reasons why they support or reject the third parties' position. [AGENT NOTE: These conversations with third parties may have provided individuals access to nonpublic information and created an environment that is vulnerable for leaks to occur.]

Interview with [redacted]

During his interview, [redacted] told investigators that while commissioners are allowed to talk with the media about investigations, OGC generally advises commissioners not to speak to the media about their concerns, personal feelings, or internal deliberations on an active investigation. He indicated that this OGC guidance is advisory, and commissioners are given more latitude to speak to the media than Commission employees. He said commissioners who elect to speak to the media about their internal deliberations should clarify that their thoughts are preliminary and they should caution the media not to use the conversation as an indicator of where their final vote may fall.

Analysis of FTC Employee Emails

The OIG reviewed email records of over 50 FTC employees and determined that many FTC employees maintained frequent contact with several reporters who covered the FTC and antitrust matters. Contact with the reporters was pervasive and noticeable throughout many layers of the organization and was not limited to the FTC's Office of Public Affairs (OPA). Managers and supervisors within the FTC's Anticompetitive Practices and Mergers 1 Divisions maintained regular email contact, both receiving and sending messages, with several reporters. Additionally, OIG analysis showed that during the Google investigation, all commissioners had contact with the media. However, the OIG investigation did not find any disclosure of nonpublic information through the email contact with these reporters.

Some of the email messages reviewed by the OIG revealed that reporters covering the Google matter were particularly assertive. The reporters repeatedly emailed FTC employees in a attempt to get them to "go on the record," "confirm," or "deny" events related to the FTC's investigation into Google. [AGENT NOTE: OIG interviews of three FTC employees revealed that on several occasions, they had experienced reporters being "aggressive." One FTC employee said reporters tried to trick him into providing information that was nonpublic.]

The analysis of the emails also identified some communications between FTC employees about the unauthorized disclosures. Some employees were concerned the disclosures could harm the FTC's reputation and speculated about the source(s) of the disclosures. Some FTC employees believed the disclosures were not a result of FTC nonpublic disclosures, while others believed FTC employees were responsible for the leaks.

[AGENT NOTE: Because of the FTC's auto-delete policy, which requires the automatic deletion of emails on the FTC server for longer than 45 days, analysis of email records was limited.]

Analysis of FTC Computer Hard Drives

The OIG reviewed the computer hard drives of four FTC officials. Analyses of these computers afforded OIG investigators the opportunity to review email messages saved on the hard drives prior to the FTC's 45 day auto-delete purging. The OIG's review did not reveal any evidence of disclosures of nonpublic information to the media.

Analysis of FTC Telephone Records

OIG investigators reviewed FTC incoming and outgoing cellular and landline telephone call records for a one-year period beginning on January 1, 2012. For selected officials, investigators analyzed records beginning in January 2010. The review showed FTC officials, both inside OPA and within other FTC divisions, maintained regular contact with reporters who covered the FTC. Investigators were unable to determine the nature or content of the telephone calls between the media and FTC employees. [AGENT NOTE: The FTC encourages contact with the media, and its policy does not preclude employees from contacting the media about public information.]

Additional Findings:

The OIGs investigation identified the following control issues.

The FTC's Communication with the Media – Public Record and Nonpublic Information

FTC regulations do not provide an exhaustive list of what information in an investigation is part of the public record. Minimal information about an FTC investigation becomes part of the public record and the FTC does not make any confidential information publicly available. Consent agreements become part of the public record only "after acceptance by the Commission." 16 C.F.R. §§ 2.32(e), 4.9(a)(1)(4). In the case involving Google, the FTC placed its agreement and proposed order with Google, as well as its closing letter to Google's counsel, on the public record on January 3, 2013.

FTC statutes and regulations define information related to an investigation as nonpublic when it is:

1) Confidential information provided to the Commission; or

2) Exempt from disclosure under the Freedom of Information Act (FOIA).

The FTC Operating Manual takes a more expansive approach, stating, "[u]nless otherwise directed by the Commission, all investigations are nonpublic." Therefore, "the existence of the investigation, the identity of the parties or practices under investigation, the facts developed in the investigation, and any other nonpublic information in the files can be disclosed only in accordance with" established FTC procedures." FTC Operating Manual, ch. 3 § 1.2.3.

An FTC statute prohibits the public release of confidential commercial or financial information obtained by the Commission. 15 U.S.C § 46(f). Any material received by the FTC in an investigation involving a possible violation of law, whether provided voluntarily or pursuant to compulsory process, is also considered confidential and, therefore, nonpublic. 15 U.S.C § 57b-2(f). The FTC Operating Manual states that this statute covers "[a]lmost any information or documents requested by staff in connection with an actual or potential law enforcement investigation." FTC Operating Manual, ch. 15 § .4.1.2. This type of confidential information is also exempt from disclosure under FOIA Exemptions. 5 U.S.C. § 552(b)(3)-(5).

Information about an investigation which is developed internally at the FTC may also be nonpublic if it is exempt from disclosure under the FOIA (5 U.S.C. § 552). Specifically, records compiled for law enforcement purposes, especially where the release of those records might interfere with enforcement proceedings, are nonpublic and exempt from disclosure under FOIA. 5 U.S.C. § 552(b)(7)(A). In addition, internal documents and

memoranda containing predecisional and deliberative information are nonpublic and exempt from disclosure under the FOIA. 5 U.S.C. § 552(b)(5).

The FTC's standards of employee conduct adopt the executive branch-wide standards of conduct developed by the Office of Government Ethics (OGE), found at 5 C.F.R. Part 2635. Those standards prohibit an employee from disclosing information gained by reason of his federal employment, which the employee knows or reasonably should know is not available to the general public, to further his interests or that of another. 5 C.F.R.§ 2365.703. Specifically, the ethics regulations prohibit a government employee from releasing nonpublic information to a newspaper reporter to further any interest. *Id.* at Example 5.

The Operating Manual provides that, "[c]onversations between staff members and the media should be 'for attribution and on the record," and any unauthorized disclosure of nonpublic information may violate federal law and lead to disciplinary proceedings. FTC Operating Manual, ch. 17 § 2.5. The manual also states, "[s]pecial care must be exercised regarding any comment or action that could effect [sic] the value of stock or other securities." *Id.* Additionally, employees are required to make and keep records of contacts [including telephone calls but not emails] with "noninvolved persons outside the Commission concerning investigations." FTC Operating Manual, ch. 16 § 10.7. A member of the media is a "noninvolved" person.

Closed Commission Meetings

Although Commission meetings are generally closed to the public, the FTC has maintained a long-standing practice (no formal directive or order exists) of allowing all employees to attend its meetings. Any FTC employee, regardless of their need to know about the details of FTC investigations, is permitted to attend these meetings. The FTC's position is that employees' attendance in the meetings is beneficial to the employees. The FTC contends that the meetings serve to inform employees on FTC news and informs them of the FTC's views on various subjects. [AGENT NOTE: Interviews with two FTC employees revealed that nonpublic information related to the Google investigation was discussed in these meetings.]

The FTC's email Auto-Deletion Policy

In 2003, the FTC implemented a 45 day auto-deletion policy for all un-archived email. The policy mandates that emails not archived by individual employees are to be automatically deleted from the server. The FTC initiated the policy because its IT infrastructure was unable to handle the large amount of messages sent and received inside and outside the FTC. Additionally, the original decision to implement this process

noted, "the agency had been needlessly saving many thousands of e-mails that should have been destroyed, all of which are potentially subject to the Freedom of Information Act and discovery requests that could cost the agency substantial resources to locate and review, if requested." Since that time, the FTC has increased its storage capabilities and made modifications to its IT infrastructure.

In a memo dated March 12, 2012, (b)(7)(C) (b)(7)(C) recommended to Chairman Leibowitz that the FTC continue its 45 day auto-deletion policy. The basis for the memo was the FTC's concern over possible future litigation. (b)(7)(C) explained that to avoid legal challenges, the current policy must be enforced "in a more rigorous manner." (b)(7)(C) suggested that the FTC require document and informational management training for all employees. He also recommended periodic assessments to ensure the employees comply with the FTC's E-discovery guidelines. In support of the position to continue the current 45 day auto-deletion policy, (b)(7)(C) explained that, "by deleting emails that need not be retained, the agency makes more efficient use of storage and thus saves on storage costs."

The existence of the automatic deletion policy limited the OIG's ability to review emails unless the emails were less than 45 days old or the employees archived the emails on their workstations.

Telephonic discussion with (b)(7)(C) (b)(7)(C)

To determine if the FTC auto-delete policy complies with the Federal Records Act (FRA), the OIG interviewed (b)(7)(C) . During his interview, (b)(7)(C) told the OIG that the FTC's record retention policy generally complies with the FRA. He said most federal agencies have similar records retention policies that require employees to identify and retain e-mails as official records. He explained that agencies with an auto-delete policy can effectively comply with the FRA requirements by issuing guidance to employees on how to properly retain e-mails that are official records in light of the auto-delete setting.

He said that NARA recognizes email retention policies which hold employees responsible for printing and filing email records can be ineffective and frequently result in the loss of records. He also indicated that creating an auto-delete policy, especially one with a short retention period (e.g., 45 days), was not a best practice for complying with the FRA. However, he indicated that this practice was not illegal.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

May 2, 2013

MEMORANDUM

To: File

From: Dena Davis
Lead Investigator

RE: Closing memo (I-12-164)

On May 2, 2013, investigative work ended in connection with the March 8, 2012, allegation regarding a conflict of interest as it relates to [redacted] This office received a letter from [redacted] requesting that this office investigate the activities of [redacted] as he accepted a position with [redacted]

In 2007, [redacted] and then [redacted] This matter concluded in December 2007.

In 2009-10, [redacted] This matter concluded in May 2010.

In the fall of 2010, [redacted] asked that [redacted] attend a meeting between [redacted] Division of the Commission. [redacted] had not initiated an investigation against [redacted] at this time. [redacted] never participated in the [redacted]

Neither of the matters where [redacted] participated were pending in the one year prior to his departure from the Commission or under his official responsibility. [redacted] was not exposed to sensitive information related to nor did he participate in FTC Matter No. [redacted] Enforcement Matter, the Commission's investigation into [redacted]

[redacted] did not seek out employment but was approached by an outside attorney representing [redacted] in the summer of 2011. It was during this contact that [redacted] was informed that [redacted] was thinking of creating a position in DC that would handle antitrust responsibilities as well as broader issues. When asked if he would be interested in such a

position, [redacted] said he would. During [redacted] Christmas vacation, he received a job listing from [redacted]

On May 1, 2012, [redacted] contacted [redacted] at the Commission, because he would like to advise [redacted] behind the scenes and potentially before the Commission in connection with the [redacted] Enforcement Matter. [redacted] is required to file for clearance to participate in the matter because the initial phases of the investigation were pending in April 2010, during his employment at the Commission.

On May 25, 2012, following an investigation into [redacted] application, White granted his request to participate in the Google Buzz Enforcement Matter pursuant to Commission Rule 4.1(b), 16 C.F.R. § 4.1(b)[1]. The [redacted] matters [redacted] worked on were closed in December 2007 and May 2010, respectively. [redacted] did not work on the [redacted] Enforcement Matter at any point. The required two-year period had passed between [redacted] participation in any [redacted] investigation under his direct and official responsibility. Additionally, the required one year period had expired concerning matters where he had substantial involvement in a [redacted] investigation and his employ at [redacted]

Additionally, [redacted] complied with Commission Rule 4.1(b) and 16 C.F.R. §4.1(b) which requires that he seek and gain approval prior to working on any matter that was pending during his employ with the Commission.

No further investigative work is required in this matter; this matter is closed.

APPROVED:

Scott Wilson

Scott E. Wilson, Inspector General

[1] Commission Rule 4.1(b) requires that any former Commissioner or employee of the FTC is required to seek and receive clearance before participating in any proceeding or investigation a) that was pending in the Commission while the former employee served; b) that directly resulted from a proceeding or investigation that was pending in the Commission while the employee served; or c) if non-public documents or information pertaining to that proceeding or investigation came to, or likely would have come to the employee's attention. 16 CFR §4.1(b) requires that former employees of the Commission be specifically authorized by the Commission to appear before the Commission as an attorney or counsel, or otherwise assist or advise behind-the-scenes regarding a formal or informal proceeding or investigation.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

April 25, 2013

MEMORANDUM

To: File

From: Dena Davis
Lead Investigator

RE: Closing memo (I-12-165)

Investigative work has ended with regard to the February 1, 2012, allegation made by a confidential informant of a violation of the Whistleblower Protection Act.

Cynthia Hogue, Chief Investigator and Counsel to the IG, met with a confidential informant over a period of several months in order to obtain documents and information in support of the aforementioned allegation.

The informant believed that [redacted] was employing retaliatory measures because the informant cooperated in a previous, unrelated IG investigation involving [redacted]. The informant stated that after sharing information confirming cooperation in the previous IG investigation to [redacted] the informant was required to report directly to [redacted] experienced a change in job responsibilities and steps were taken to re-classify the position from [redacted]

Hogue advised the informant that in order to move forward with a thorough investigation, this office would need to reveal the informant's identity. Hogue presented the informant with other avenues to pursue this matter including filing an Equal Employment Opportunity (EEO) complaint, filing a complaint with the Office of Special Counsel (OSC) and filing a grievance through the union.

The informant spoke with [redacted] and initiated a claim of age discrimination against [redacted]. Additionally, the informant initiated a grievance against [redacted] through the American Federation of Government Employees (AFGE) union, Local 2211.

No additional investigative work related to this matter was undertaken by this office. Subsequently, both (b)(7) and the confidential informant have left the employ of the Federal Trade Commission. No further action is required by this office; this matter is closed.
APPROVED:

Scott Wilson

Scott E. Wilson, Inspector General

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

April 11, 2013

MEMORANDUM

To: File

From: Dena Davis
Lead Investigator

RE: Closing memo (I-12-166)

On April 11, 2013, investigative work ended in connection with the April 13, 2012 complaint of bribery against [redacted]

[redacted] reported to this office that he received information that [redacted] may be receiving benefits for directing work to a particular contractor.

This investigation revealed that [redacted] spoke with [redacted] who related that she has heard from others in the industry that [redacted] directs work to one contractor, [redacted] had no first-hand knowledge of misconduct and stated that [redacted] was typically 60% cheaper than other contractors while producing a good work product. An interview with [redacted] revealed that she had no first-hand knowledge of misconduct but felt the way work was assigned is questionable, as she did not feel that [redacted] produced quality work.

The investigation found no evidence to support the allegations in this matter. No further action is required in this case. This case is closed.

APPROVED:

Scott Wilson

Scott Wilson, Inspector General

REPORT OF INVESTIGATION

ADMINISTRATIVE DATA

Subject: (b)(7)(C)
(b)(7)(C)

Allegation: 18 U.S.C. § 209 (Bribery: Salary of Government officials and employees payable only by United States)

OIG Case File: I-12-166

Date of Report: April 11, 2013

Prepared by: _____
Dena N. Davis, Lead Investigator

Approved by: _____
Scott Wilson, Inspector General

Allegation

This case is predicated on the April 13, 2012, allegation by (b)(7)(D) (b)(7)(D) that (b)(7)(C) is receiving benefits from a contractor. (b)(7) alleges that a rival contract employee, (b)(7)(C) has heard that (b)(7)(C) is being paid off for giving a specific contracting company FTC business.

Prohibitions

Title 18 U.S.C. 209 Salary of Government officials and employees payable only by the United States

The FTC employee handbook, pages 4-5, under Responsibilities as a Federal Employee, bullet 4, *Employees shall not, except pursuant to such reasonable exceptions as provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the Employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.*

Details

On April 13, 2012, (b)(7) received information from (b)(7)(C) (b)(7)(C) that (b)(7)(C) contractor for (b)(7)(C) a sub-contractor for (b)(7)(C), believed that (b)(7)(C) routinely directed contracts to (b)(7) (b)(7)(C) held the position of (b)(7)(C) He had the ability to choose between contractors to complete necessary forensic work but could not hire anyone with (b)(7)(C) approval.

An interview with (b)(7)(C) on April 22, 2012, revealed that (b)(7) is a primary contractor under the (b)(7)(C) contract. Additionally, (b)(7)(C) hourly cost is approximately 60% less than the costs of other contractors. According to (b)(7)(C) there have been no complaints about the quality of work produced by (b)(7) employees.

During a discussion (b)(7)(C) had with (b)(7)(C) she expressed concerns regarding the activity of (b)(7)(C) did not believe that was being utilized enough even though she felt as if work produced by (b)(7)(C) was not as precise as that produced by others. (b)(7)(C) also questioned why (b)(7)(C) was not used on a particular project. did not understand why (b)(7)(C) was involved in this project and (b)(7)(C) was not. Unbeknownst to (b)(7)(C) had asked for more substantive work and would be filling in for (b)(7)(C) while he was out on leave.

(b)(7)(C) also expressed concerns to (b)(7)(C) about why (b)(7)(C) was not being used as a contractor. (b)(7)(C) revealed that (b)(7)(C) had not produced the necessary paperwork in order to have their employees certified.

On April 1, 2013, a follow-up interview was held with (b)(7)(C) who identified as the person who initially raised allegations of bribery and/or graft. (b)(7)(C) stated that he had no tangible evidence to support the allegations raised by all of the allegations came from (b)(7)(C) who works for a competitor of Additionally, he stated that (b)(7) was cheaper than other contractors were and produced good work product.

On April 11, 2013, an interview was conducted with (b)(7)(C) who stated that she has no first-hand knowledge of (b)(7)(C) receiving gifts and/or bribes in return for steering work to the (b)(7)(C) contract. (b)(7)(C) stated that she had heard from others in the industry that (b)(7)(C) routinely directed work to (b)(7)(C) Additionally, (b)(7)(C) stated that she did not believe the work product produced by (b)(7) was good, as it had to be re-done periodically.

was removed from his position as (b)(7)(C) due to unrelated performance issues.

A review of assets revealed nothing indicating bribery. Additionally, a review of his email and FTC computer revealed no evidence to support the allegation.

Findings

No evidence was found to support the allegation of bribery against

Conclusion

This investigation revealed no evidence to support the allegation against (b)(7)(C) is a primary contractor on the (b)(7)(C) Allegations of bribery came from a competitor of who possessed no first-hand knowledge of wrongdoing. Additionally, (b)(7)(C) cost is approximately 60% less than other contractors are and there are no complaints regarding their work product.

FEDERAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION

File No. 1-12-[redacted]168

ORIGINAL

IMPORTANT NOTICE

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Office of Inspector General

July 10, 2013 FINAL

MEMORANDUM

TO: Pat Bak
Acting Executive Director

FROM: Scott E. Wilson
Inspector General

SUBJECT: Investigative Referral (I-12-168)

We received several allegations from agency employees[1] that (b)(7)(C) (b)(7)(C) engaged in procurement improprieties in connection with the award of a consulting contract to (b)(7)(C) The information set forth below substantiates the allegations that (b)(7)(C) violated provisions of the Federal Acquisition Regulation and Procurement Integrity Act. This memorandum memorializes the evidence presented to you and then-Executive Director, Eileen Harrington on December 12, 2012. During our December 12th meeting, we presented you with digital forensic evidence that substantiated allegations that (b)(7)(C) conduct compromised procurement integrity. You have informed me that, based on the evidence we presented to you on December 12th, agency management asked (b)(7)(C) to resign no later than March 1, 2013.

The evidence presented below relates to (b)(7)(C) efforts to procure the contracted services of (b)(7)(C) (b)(7)(C) The FTC Awarded a contract (b)(7)(C) to (b)(7)(C) company, (b)(7)(C) on (b)(7)(C)[2] The contract is currently in the second year. Three additional option years remain on the contract.

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[1] The Inspector General Act of 1978, as amended, protects the identity of individuals who, *inter alia*, provide information to the Office of Inspector General. 5 U.S.C. app. 7(b).

[2] The contract was a one year contract with four option years.

During our investigation, we conducted investigative interviews, including an interview of [redacted] on November 21, 2012. We analyzed digital forensic evidence contained on three FTC computer hard drives assigned to: (1) [redacted] (2) [redacted] and (3) [redacted] OCIO issued a laptop to [redacted] contrary to the terms of the Request for Proposals (*i.e.*, RFP [redacted] and contract [redacted].[3] We also analyzed [redacted] FTC phone records.

Summary of Investigative Findings

Our investigation confirmed that [redacted] engaged in four categories of misconduct: (1) he interfered with the procurement process to steer the contract to [redacted] company, [redacted]; (2) he used [redacted] to perform FTC work *prior to* the FTC's award of the contract to [redacted] (3) he used [redacted] to perform work that was outside the scope of the contract but inured to [redacted] personal benefit; and (4) he made statements that misrepresented the facts during his OIG interview.

First, [redacted] conduct compromised the integrity of the procurement process during the solicitation and evaluation phases of the proposed procurement of consulting services. He acknowledged that he had received training on the Federal Acquisition Regulations when he worked for [redacted] Telephone records revealed that [redacted] had at least nine calls to or from [redacted] prior to [redacted] bid on one of the four FTC solicitations for consulting services. One of the calls occurred moments before [redacted] prepared the document that would become his bid submitted to the FTC less than two hours later. [redacted] bid was a few hundred dollars below the $291,000 independent government cost estimate for the requirement. Statements of [redacted] involved in the procurement, coupled with successive solicitations and cancellations, indicate that [redacted] communications gave [redacted] firm an advantage over other bidders and that [redacted] afforded [redacted] preferential treatment.

Our investigation did not uncover the content of the conversations between [redacted] and [redacted] These conversations, particularly the June 24, 2011 3:49 p.m. three and a half minute call to [redacted] coupled with the amount of [redacted] bid – virtually identical to the independent cost estimate – are circumstantial evidence of [redacted] disclosure of non-public information to a prospective bidder. Such disclosures violate both the Procurement Integrity Act and Federal Acquisition Regulations.

Second, forensic evidence revealed that [redacted] *de facto* engaged the consulting services of [redacted] *pre-award* and thereby circumvented Government contracting

[3] Contracting Officer, [redacted] learned of the improper issuance of Government computer equipment to [redacted] and demanded its return. [redacted] had use of the FTC Dell laptop for approximately six months. The solicitation Questions/Answers stated that "computers were to be provided by contractor (personally owned)." *See* Question/Answer 5 to RFQ [redacted]

procedures. We found that [redacted] performed substantive FTC work for [redacted] prior to the [redacted] contract award date. Notably, one criterion that served as a basis for [redacted] selection of the winning bidder was the bidder's understanding of the agency's requirement. With [redacted] communications and pre-award work performed by [redacted] had an unfair advantage over other bidders.

Third, [redacted] also performed out of scope work for [redacted] personal benefit during the base year of the contract. That work consisted of preparing a letter of recommendation for [redacted] to sign, multiple resumes and application materials for [redacted] use in his job search efforts from May 2012 - September 2012.

Finally, [redacted] made misrepresentations in his OIG interview regarding his involvement in the procurement process during the evaluation of bid phases.

I. Statutory and Regulatory Authority

A. Procurement Integrity Act, 41 U.S.C. 423

The Procurement Integrity Act prohibits inappropriate disclosure of information at any point in the acquisition process. The Procurement Integrity Act prohibits the disclosure of "contractor bid or proposal information" and "source selection information." Source selection information, defined in Federal Acquisition Regulation ("FAR")[4] 2.101, includes, "any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly: (1) bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening; (2) proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices; (3) source selection plans; (4) technical evaluation plans; (5) technical evaluations of proposals; (6) cost or price evaluations of proposals; (7) competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract; (8) rankings of bids, proposals, or competitors; (9) reports and evaluations of source selection panels, boards, or advisory councils; (10) other information marked as "Source Selection Information—See FAR 2.101 and 3.104" based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

[4] The Federal Acquisition Regulation is codified at 48 C.F.R. 1.101, et seq.

B. Federal Acquisition Regulation

1. FAR Part 1.602-3

Ratification of Unauthorized commitments: Ratification, as used in this subsection, means the act of approving an unauthorized commitment by an official who has the authority to do so. [A]s used in this subsection, ["unauthorized commitment"] means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government. . . . Agencies should process unauthorized commitments using the ratification authority of this subsection instead of referring such actions to the Government Accountability Office for resolution.

2. FAR Part 3.104-4(a)

No person may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by the agency head or the contracting officer to receive such information.

3. FAR Part 3.101-1

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

C. Government-wide Standards of Conduct for the Executive Branch[5]

5 CFR 2635.703 provides that "[a]n employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

[5] Although the FTC is an independent agency, it follows the Government-wide Standards of Conduct for the Executive Branch.

D. FTC Policy Violation

FTC Administrative Manual, Chapter 2, Section 300 provides that:

The Chairman is designated by law as the agency's "Contracting Official." The authority to procure goods and services has been delegated by the Chairman to other individuals on the Commission's staff. Generally speaking, the Executive Director, the Chief Financial Officer (CFO), and the Assistant CFO for Acquisition have procurement authority for all goods and services, regardless of cost. Contract Specialists within the Acquisition Branch have been delegated procurement authority within specific dollar limitations. *These individuals are the only officials who have the authority to obligate the FTC to spend appropriated funds for goods and services.* One of these individuals is always the "Contracting Officer" for FTC contracts. (Emphasis added)

II. Investigative Findings

A. Successive Solicitations and Cancellations

The FTC issued four solicitations for an FTC consulting contract, awarded to (b)(7) (b)(7)(C). After the agency issued the first three solicitations, the technical evaluation panels were unable to provide sufficient justification to select (b)(7)(C) firm, (b)(7). Evidence revealed a pattern whereby (b)(7)(C) would inform (b)(7)(C) that the contract could not be awarded to (b)(7) at which point (b)(7)(C) wanted the solicitation cancelled.[6]

B. Interference with Procurement Process

(b)(7)(C) began service as the (b)(7)(C) on (b)(7)(C) (b)(7)(C).[7] Prior to his arrival at the FTC, he contacted (b)(7)(C) (b)(7)(C) staff to request the procurement of consulting services to support him in his upcoming work as (b)(7)(C).[8] Former (b)(7)(C) recalls

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[6] Interviews of (b)(7)(C) (August 23, 2012; December 21, 2012) and (b)(7)(C). The agency would then have to revise the Statement of Work and re-issue the solicitation, making it appear that the requirement had changed. This was a tactic used to modify conditions that would lead to (b)(7)(C) selection by the successive evaluation panel. (b)(7)(C) described the fact that it took four times as "unconscionable" and (b)(7)(C) described it as "an embarrassment to the agency." With each successive solicitation, efforts were made to limit competition by narrowing the qualifications and/or expertise of the contractor.

[7] (b)(7)(C) stated that he received the offer to come to the FTC on (b)(7)(C)

[8] On Tuesday, February 22, 2011, prior to his arrival at the FTC, (b)(7)(C) sent a draft SOW for IT "Assessment and Recommendations" consulting services to (b)(7)(C) (b)(7)(C). Attachment 1. (b)(7)(C) transmittal

receiving [redacted] email attaching the draft Statement of Work (SOW). The draft SOW described, in general terms, the work to be performed under the proposed contract for consulting services.[9] After [redacted] arrived at the FTC, [redacted] and [redacted] continued preparing the final SOW. The agency's contracting office awarded the contract to [redacted] on [redacted] following four solicitations and cancellations.[10]

Evidence indicates that [redacted] actions compromised the integrity of the procurement process. [redacted] pressured members of the Technical Evaluation Panel led by [redacted] expressed concern and displeasure that the procurement process was taking so long.[11] [redacted] Virtually everyone involved in the procurement process – ranging from TEP members, acquisitions staff and the agency's Chief Financial Officer – knew which vendor was [redacted] "favored vendor." Five individuals [redacted] stated that they knew based on [redacted] statements indicating which vendor he wanted to win the award.[12]

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email message stated, '[redacted] here is the SOW I mentioned on Friday. Most of this I pulled off the website . . . . it need [sic] an IGE [Independent Government Cost Estimate], no pride of authorship. [redacted]'

[9] In his OIG investigative interview, [redacted] stated, *sua sponte*, prior to any questions on the subject, that he had used a draft statement of work that [redacted] had prepared in connection with prior work for [redacted] at the [redacted] first met [redacted] in 2003-2004 when they worked together at [redacted]

[10] Interview of [redacted] (August 23, 2012).

[redacted]

[12] One example illustrates [redacted] widely known pre-selection of [redacted] stated that [redacted] told [redacted] in [redacted] presence that [redacted] was a vendor that [redacted] wanted to get on board. Both [redacted] the [redacted] also knew that [redacted] was the vendor that [redacted] wanted. [redacted]

(b)(7)(C) described daily pressure from (b)(7)(C) to provide status updates during the pre-award stage. *See* Attachment 2 (March 21, 2011 email from (b)(7)(C) to (b)(7)(C) stating, (b)(7)(C) has asked (b)(7)(C) to report to him daily on the progress of his 'review' effort"). *See also* Attachment 3 (Sept. 6, 2012 email from (b)(7)(C) to C.Hogue (OIG) explaining, "The other thing, and I'm not proud of it, is that the numerical scoring reflects the pressure 'to get along, go along." (b)(7)(C) stated in his December 10, 2012 interview that he asked (b)(7)(C) to advise (b)(7)(C) of the procurement process. At this early juncture, (b)(7)(C) (b)(7)(C) had yet to obtain the funding for the contract. (b)(7)(C) complained that the process was taking longer than he wanted. (b)(7)(C) sent email messages to (b)(7)(C) stating that (b)(7)(C) and (b)(7)(C) were ready to assist as needed to move the process forward.[13] In his June 7, 2011 email to (b)(7)(C) with a "cc" to (b)(7)(C) wrote (see attachment 5):[14]

> Is there any chance I can get **this contractor** on board for tomorrow [sic] (b)(7)(C) meetings? I'm willing to give you my next born . . . whatever it takes. (b)(7)(C) (Emphasis added)[15]

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and also stated that they knew that wanted to get the contract. (b)(6) recalled describing as "the smartest man I know." (b)(6) statements were made pre-award during the solicitation and evaluation phases of the procurement.

[13] For example, on June, 13, 2011, sent an email to (b)(7)(C) stating, "(b) and (b)(7)(C) are at the ready." Parenthetically, during his OIG investigative interview, (b)(7)(C) stated that he did not even know the identities of his staff members who were sitting on the Technical Evaluation Panel. (b)(7)(C) Interview Tr. at 23-24, 38, 40-41 (stating that he did not know who was on the TEP and did not have input on the staffing of each TEP). (b)(7)(C) statement to the OIG is refuted by (1) a July 2011 email from (b)(7)(C) to (b)(7)(C) and (2) (b)(7)(C) statements to the OIG. On July 22, 2011, sought (b)(7)(C) concurrence in the nomination of three (b)(7)(C) staff to serve as members of the TEP. (b)(7)(C) responded, "I'm good with (b)(7)(C) and (b)(7)(C) I can't add anything to (b)(7)(C) plate . . . (b)(7)(C) how about (b)(7)(C) or (b)(7)(C) (Email from (b)(7)(C) to (b)(7)(C) July 22, 2012). (Attachment 4) *See also* (b)(7)(C) email to (b)(7)(C) (stating, "(b) and (b)(7)(C) are at the ready.") Notwithstanding the foregoing, additional evidence refuted (b)(7)(C) statements. (b)(7)(C) stated in his interview that he had received and signed the appointment letter, appointing (b)(7)(C) to serve as the (b)(7)(C) (b)(7)(C) on the procurement. The appointment letter from the (b)(7)(C) (b)(7)(C) advised (b)(7)(C) *inter alia*, of his duties as The letter explicitly informed (b)(7)(C) that (b)(7)(C) had nominated (b)(7)(C) to serve in that capacity. As (b)(7)(C) on the proposed acquisition, (b)(7)(C) duties included leading the TEP.

[14] During the preceding week, (b)(7)(C) sought to have attend the kickoff meeting, only to be informed by his staff that attendance was impermissible. Though the procedural posture of the solicitation remained the same, (b)(7)(C) again sought to involve (b)(7)(C) in (b)(7)(C) activities (while proposals were being evaluated).

[15] (b)(7)(C) sent an email to (b)(7)(C) on May 31, 2011, discussed *infra*, indicating

[redacted] replied to [redacted] request to have [redacted] attend the June 8 [redacted] meetings:

> My understanding is that after several requests and iterations, the [redacted] just received updated evaluation details and documentation from the technical evaluation committee last Friday. [redacted] and company will do the best they can to process your procurement request as soon as possible while maintaining the integrity of the process and ensuring that all required documentation and justifications are in hand prior to making the award to the best bidder. [redacted]

[redacted] request to have "this contractor" participate in substantive [redacted] meetings occurred during the solicitation phase. The solicitation was pending and bids were due two weeks later. Despite [redacted] implicit denial of his request, [redacted] disregarded the integrity of the process and *de facto* engaged [redacted] consulting services despite the fact that he lacked contracting authority. He compromised the integrity of the procurement by seeking [redacted] consulting support on several [redacted] tasks, including analyzing "customer" IT needs. This substantive work, *inter alia*, provided [redacted] with intimate knowledge of agency-wide IT requirements at the FTC, giving [redacted] an unfair advantage over other bidders. One criterion on which bids were evaluated was the bidder's understanding of the agency's requirement. Forensic analysis of [redacted] FTC computer uncovered a spreadsheet [redacted] prepared for [redacted] summarizing IT needs and concerns among several [redacted] business clients throughout the agency. Additional work product prepared by [redacted] pre-award is described, *infra*, Table II.

[redacted] conduct violated FAR 3.101-1 (preferential treatment toward [redacted] including giving [redacted] inside access to FTC [redacted] operations); and 5 C.F.R. 2635.703 (provided [redacted] with nonpublic inside information about FTC [redacted] operations, etc. which gave [redacted] an unfair advantage in the bidding process, as one criterion was "technical understanding of the requirement"). [redacted] conduct also created an unauthorized commitment in violation of FAR

[redacted] desire to have [redacted] attend a June 1st kickoff meeting with another contractor. [redacted] stated to [redacted] "the support contractor I'm trying to get on board help [sic] my last organization integrate [redacted] into our business processes. I think we're close . .. If we can I'll have them attend [the June 1 kickoff meeting on the [redacted] upgrade with another contractor] as well." Email from [redacted] to [redacted] (May 31, 2011). Attachment 6 The June 1st meeting that [redacted] wanted [redacted] to attend was scheduled for 1:00 p.m. - 3:00 p.m. After his staff informed him that [redacted] could not attend the meetings, [redacted] received a call on June 1st at 9:32 a.m. from [redacted] cell phone. The call lasted 27 minutes. [redacted] reference in the email to [redacted] on June 7th to "this contractor" leaves no doubt which vendor he wanted to accompany him to the FTC [redacted] meetings. Moreover, forensic evidence confirms that [redacted] flouted the admonitions of his staff who said that the [redacted] could not attend because the contract had not yet been awarded. [redacted] prepared multiple spreadsheets for [redacted] relating to the [redacted] meetings with FTC stakeholders. [redacted] statements and actions leave no doubt that his June 7th email to [redacted] made reference to [redacted]

1.602-3 and FTC Policy (Administrative Manual Chapter 2, Section 300). [redacted] actions in engaging [redacted] President [redacted] in substantive FTC work, beginning six months prior to the award of the contract to [redacted] exposed the Government to a potential claim. FAR 1.602-3 and Admin. Manual, Ch.2, Sec. 300, are intended to avoid such unauthorized commitments on behalf of the Government.

C. Solicitations

Records from the [redacted] were incomplete and disorganized. Although [redacted] were helpful in responding to requests for information, many documents were missing. This impeded our investigation. As an example, each cancellation should have been documented in a separate file to explain the justification for the cancelled solicitation. No such files or records explaining the bases for the repeated cancellations exist. Based on the available information from all sources (*i.e.*, [redacted] acquisition files, interviews, etc.), we were able to piece together partial information respecting each of the four solicitations. These incomplete data are presented in Table I.

The FTC issued the second solicitation on (b)(7)(C) at 6:34 p.m.[16] The deadline for bids was five days later, including Saturday and Sunday.[17] Later, the deadline was twice extended, ultimately until (b)(7)(C) (b)(7)(C) stated that when it became apparent that the TEP would not be able to justify selecting (b)(7)(C), the solicitation was cancelled. (OIG Investigative Interview of (b)(7)(C) August 23, 2012) (b)(7)(C) stated that it was not his decision to cancel the solicitation but that only the (b)(7)(C) (b)(7)(C) had the authority to do that. Because the (b)(7)(C) cannot locate either the (b)(7)(C) contract file[18] or the separate file that, according to (b)(7)(C), should have been created to document the cancellations, we have only testimonial evidence to explain why the solicitation was cancelled. recalls that the reason the successive solicitations were cancelled was because the TEP was not able to justify selection of as the recommended vendor. At the time that (b)(7)(C) cancelled the solicitation, "at least one other vendor (b)(3):423(a) had a better value." (Interview of (b)(7)(C) December 10, 2012). (b)(7)(C) stated that (b)(3):423(a) offered the best value to the agency. When (b)(7)(C) learned that the TEP had selected (b)(3):423(a) (b)(7)(C) told (b)(7)(C) and (b)(7)(C) that he did not want to work with (b)(3):423(a) Thereafter, (b)(7)(C) cancelled the solicitation. (b)(7)(C) (b)(7)(C) confirmed that (b)(7)(C) cancelled the solicitations.[19]

The pattern of issuing a Request for Quotes (RFQs) and later cancelling the solicitation repeated itself two additional times. Each time, the Statement of Work was slightly modified and re-issued. After (b)(7)(C) retired, (b)(7)(C) selected a different to lead the TEP. In each instance, members of the TEP stated that everyone knew which vendor wanted.

During his November 21, 2012 OIG interview, (b)(7)(C) stated that he did not cancel the solicitation. He said that he lacked the authority and that only (b)(7)(C) could do that. This characterization of who was the catalyst for the cancellations was contradicted by statements of others who were involved in the process. For example, (b)(7)(C) stated that it was (b)(7)(C) who said to "call it off." (Interview of (b)(7)(C) August 27, 2012).

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[16] The date of the first solicitation is unknown. However, we found a record of its cancellation on (b)(7)(C)

[17] The OIG obtained an email from a third party Government contractor who noted the short time frame and observed that such short deadlines typically indicate pre-selection.

[18] (b)(7)(C) provided access to disorganized paperwork but no complete contract file. None of the paperwork shed light on any of the justifications for cancelling the three solicitations. (b)(7)(C) recalled that the agency issued four solicitations and cancelled three, noting that the process was an "embarrassment to the agency."

[19] (b)(7)(C) described a pattern whereby (b)(7)(C) would "override his technical evaluation team, every time." OIG Interview of (b)(7)(C) December 21, 2012. (b)(7)(C) cautioned (b)(7)(C) that the problem with (b)(7)(C) was that the company had no depth of personnel (there were only two principals who would perform on FTC requirements described in the Statement of Work).

(b)(7)(C) stated that (b)(7)(C) cancelled the solicitation. (Interview of (b)(7)(C) December 10, 2012). (b)(7)(C) stated that the solicitation was cancelled by (b)(7)(C) two times stating "I don't know why he cancelled it" and (b)(7)(C) had no input into the cancellations. (b)(7)(C) Interview Tr. at 37-38 (*See* Attachment 9 for full (b)(7)(C) Interview Transcript).

Although we found no documents explaining the reasons for the cancellations, we did find records indicating that (b)(7)(C) held at least four debrief meetings for unsuccessful bidders, including: (b)(3):423(a) (b)(3):423(a) The "talking points" used at the debrief meetings stated, *inter alia*, that the TEP evaluation criteria included, *inter alia*, technical understanding of the requirement.

D. Work Performed for [redacted] Prior to Contract Award

During the solicitation process, and even prior to issuance of the first RFQ, (b)(7)(C) was performing substantive FTC work for (b)(7)(C) During his OIG interview, (b)(7)(C) denied that he asked [redacted] to do work for him. Notwithstanding (b)(7)(C) denial, we have forensic evidence of multiple work products that were authored by (b)(7)(C) and given to (b)(7)(C) These were found on (b)(7)(C) FTC computer hard drive. In each instance, the metadata shows (b)(7)(C) authorship. Table II highlights the pre-award FTC work product authored by (b)(7)(C) at (b)(7)(C) request. Attachment 7 includes all the work products described in Table II.

When presented with the forensic evidence during his 2.5+ hour investigative interview, [redacted] could not explain why [redacted] name showed up in the metadata as authoring FTC work products prior to his being awarded the consulting contract. His explanations fell into one of three categories: (1) stating "I don't know" why [redacted] prepared the work;[20] (2) defending the action because it didn't cost the Government anything because the FTC was not yet paying for [redacted] services;[21] and (3) challenging the accuracy of the metadata, stating that, "Metadata

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[20] He attempted to explain that [redacted] simply did the work based on general discussions that [redacted] had with [redacted] regarding the new projects that [redacted] was working on at his new job as FTC [redacted] The details of the work product demonstrate [redacted] high level of involvement. The work includes many details that would not have been part of general discussions about [redacted] responsibilities as FTC [redacted] For example, one spreadsheet prepared by [redacted] for [redacted] simply maps out where certain programs could be located on [redacted] computer desktop. Another spreadsheet prepared by [redacted] summarized [redacted] June/July 2011 so-called [redacted] meetings with various FTC organizations, including descriptions of IT needs of various "customers" throughout the agency. Additional spreadsheets show specific budget numbers that [redacted] disclosed to [redacted] These budget numbers were used by [redacted] to generate several spreadsheets and pie charts to be used by [redacted] in budget presentations to [redacted] In one instance, [redacted] complimented [redacted] on how professional the presentation appeared and further asked him who did the work. [redacted] told her that he did the work. One witness to that colloquy referred to that incident during an investigative interview.

[21] Following that statement, [redacted] was informed that the additional services would have been performed on behalf of the FTC in violation of the Antideficiency Act and would have impermissibly augmented the FTC's appropriation. [redacted] Interview Tr. at 61-62:

Hogue: So, why was he doing work relating to [redacted] at the FTC in March 2011?

[redacted] I don't know.

Hogue: Well, you asked him to.

[redacted] I'm sure I did because we had a very poor enterprise architecture structure here. So, I said, hey, look, we need to get better at this, what do you got for me? I probably said something like that.

* * *

Hogue: And you understand that that's not permitted.

[redacted] Okay. Why wouldn't that be permitted?

Hogue: He doesn't work for the FTC. He's not a contractor for the FTC.

can be changed, you know." [22]

Notwithstanding [redacted] rationalizations for the pre-award work performed by [redacted] there were occasions when [redacted] acknowledged that such work would have been improper:

Hogue: So, the problem with that is that he created this. He created this. There's no you created it; he created this.

[redacted] Did he? Oh, okay. So, how would he know who [redacted] was?

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* * *

Hogue: It's an augmentation of the FTC's budget which is criminal. Do you understand that?

[redacted] We didn't pay for it though.

Hogue: You're getting a service – the Government is getting a service. Augmentation means adding on to it. When Congress establishes an agency's budget – –

[redacted] Mm-hmm.

Hogue: – – that's the cap that the agency can spend.

[redacted] I understand that.

Hogue: It's not allowed to receive donated services. That's a violation of the Anti-Deficiency Act, which has criminal sanctions. You're aware of that, correct?

[redacted] I am, yes.

Id. at 61-62.

[redacted] also noted that [redacted] conduct in soliciting work from [redacted] prior to contract award created an unauthorized obligation on behalf of the Government. In the event [redacted] sought compensation for such services, [redacted] would be personally liable for the uncommitted obligation on behalf of the Government.

[22] The implication of [redacted] statement challenging the veracity of the metadata was that someone changed the authorship in order to create the impression that [redacted] was the author (when in fact he wasn't the author). In response to this explanation, the OIG informed [redacted] that the work product was found on his own FTC computer hard drive. We also informed [redacted] that some of the forensic evidence was found in his "temporary internet files" folder, indicating that [redacted] had received the documents via email. Thereafter, [redacted] simply stated that he did not know why [redacted] prepared the work product.

Hogue: You told him.

[redacted] Well, I sent him a – – probably sent him a document with [redacted] and my input into it and he just created a new one – –

Hogue: Mm-hmm.

[redacted] – – based on that.

Hogue: Mm-hmm, Okay. And you know that having a prospective bidder doing work for you, who's not under contract and not an employee, is impermissible? You're aware of that?

[redacted] I am.

[redacted] Interview Tr. at 63. [redacted] conduct violated FAR 3.101-1 by affording [redacted] an opportunity to perform substantive work relating to an FTC contract, when other potential bidders were not afforded the same opportunity. [redacted] gave [redacted] preferential treatment as compared to other bidders on the RFQ. [redacted] familiarity with the FTC [redacted] undoubtedly gave [redacted] an unfair advantage over other bidders, particularly when "technical understanding of the requirement" was one of the evaluation criteria against which competing bids were assessed.

E. Pre-Award Telephone Contacts Compromised the Procurement Integrity Process

During the pre-solicitation or solicitation phases, [redacted] had nine telephone contacts from his FTC office telephone to either [redacted] or the other principal of [redacted] Table III presents the call data history between [redacted] and [redacted] Calls occurring on certain dates, indicated by shaded rows in Table III, correspond with contemporaneous events related to the [redacted] bid. The contemporaneous events are discussed, *infra*. Notably, during the solicitation and bidding phases, [redacted] should have had *no communications* with a proposed bidder on a contract that was to be awarded for requirements.

We found one contact to be most noteworthy and incriminating. One deadline for bids was [redacted]. On that date, [redacted] telephoned [redacted] at 3:49 p.m.[23] Parenthetically, that call was preceded by an incoming call from a blocked number two minutes earlier. That call may have provided an opportunity for [redacted] to disclose either the number of bids that the FTC had received and the dollar amount of each bid and/or the Independent Government Cost Estimate (IGCE). [redacted] posited that, "it was to make sure that they didn't leave money on the table." Forensic evidence shows that [redacted] created his bid document [redacted] at 4:10 p.m., just 17 minutes after [redacted] call to him. [redacted] telephone call data history coupled

[23] At 3:47 p.m., two minutes prior to this outgoing call to [redacted] received a call from a blocked number. The call lasted less than a minute, presumably to leave a voice mail message for [redacted] The next call made by [redacted] was to [redacted]

with the metadata contained in [redacted] bid document is circumstantial evidence of [redacted] improper conduct that compromised the integrity of the procurement process. The call data records and metadata evidence, coupled with the amount of [redacted] bid (just a few hundred dollars below the IGCE of $291,000), are indirect evidence of [redacted] coordination with [redacted] prior to [redacted] submission of its [redacted] bid. [redacted] denied that he shared any pricing information.

(b)(5),(b)(7)(C)

[redacted]

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[24] The number was blocked. The call was short, most likely to leave a brief voice mail message. Less than two minutes after the caller hung up, [redacted] called [redacted] cell phone. This occurred just before [redacted] created the bid that he would submit to the FTC at 4:10 p.m.

[25] [redacted] home address is listed in "CRR Search Results," received from [redacted] as: [redacted] Columbia, MD [redacted] The [redacted] area code home number for [redacted] was made available to the OIG from other sources. [redacted] home number is listed as [redacted] in CRR Search Results, obtained from [redacted]

(b)(5) (b)(7)(C)

Initially in his OIG investigative interview, [redacted] denied that he had any communications with [redacted] representatives. When advised that we had evidence that he had communications by telephone, he stated that he and (b)(7)(C) might have discussed [redacted] work that (b)(7)(C) was working on at the time. Later when asked whether he ever discussed FTC work with (b)(7)(C) during the "pre-award" stage (*viz.*, [redacted] through (b)(7)(C) (b)(7)(C) acknowledged that he "could have," as described in the following excerpt from his OIG investigative interview:

> Hogue: Now, let's go back, Mr. (b)(7)(C) to your pre-award communications with Mr. (b)(7)(C) If I understood you earlier, you said that you had no communications with him about FTC work. Any communications you would have had, you said, would have been about [redacted] work that he was still working on.
>
> (b)(7)(C) I don't recall. I could have. Specifically, I don't know exactly what it would have been on and stuff. But FTC work was probably heavy on my mind and, again, I've used his advice in the past. So, yeah, I don't recall specifically asking him, hey, what do you think about this, what do you think about that. But would I share briefings with him and stuff? Probably. Hey, what do you think about this, what do you think about – – he's a whiz at stuff like that. But he wasn't under contract, so it wasn't costing the Federal Trade Commission anything and nobody was – – the selection panel had no knowledge of that or anything like that either. So – – but I don't know exactly. I can't say for sure that I did not.

(b)(7)(C) Interview Tr. 41-42 (Nov. 21, 2012). Later, after (b)(7)(C) had been presented with several examples of pre-award FTC substantive work prepared by (b)(7)(C) (b)(7)(C) acknowledged his pre-award contacts with [redacted] that focused on FTC projects:

> Hogue: Okay. So, I think we've established that you had communications with Mr. (b)(7)(C) during the closed sealed bid period. Wouldn't you agree with that?
>
> (b)(7)(C) I suspect we did, yes.

(b)(7)(C) Interview Tr. at 87.

When asked about his telephone call to [redacted] on [redacted] at 3:49 p.m., less than two hours prior to [redacted] submission of his bid to the FTC, [redacted] stated that his call to [redacted] on that date and at that time was "pure coincidence." Forensic examination of [redacted] bid shows that [redacted] created the bid document at 4:10 p.m., just 17 minutes after ending his call with [redacted] We find this to be circumstantial evidence of [redacted] conduct which compromised the integrity of the procurement process. [redacted] stated that a call to a potential bidder just moments before the bid was prepared may have been an opportunity for the vendor to know how many bids had been received at that point in time and what the amount of the bids were (so the prospective bidder would "have enough money on the table.") We have no evidence of the content of [redacted] call to [redacted] on [redacted]

[redacted] admitted that he did not adhere to the restrictions of the sealed bid process. He defended his actions by stating that he did not know that this was a sealed bid process that constrained communications that he could have with prospective vendors:

> Hogue: So, it's just pure coincidence then that you called him within two hours of his submission of his bid?
>
> [redacted] Yeah, pure coincidence.
>
> Hogue: Okay. And you understand that this was a confidential sealed bid process?
>
> [redacted] I do now, yes.
>
> Hogue: But you didn't understand that that day?
>
> [redacted] No, I didn't understand that that day.
>
> Hogue: Okay. And then how – –
>
> [redacted] Those are details I don't really worry about; someone else does.
>
> Hogue: Right. You don't worry about them?
>
> [redacted] No.
>
> Hogue: Hmm. So, how was it that you were first informed that it was a confidential sealed bid process?
>
> [redacted] About 20 minutes ago when you told me.
>
> Hogue: Okay. Prior to my telling you, you didn't know that?
>
> [redacted] No.

Hogue: Okay. Never came up in the FAR training you got?

[redacted] Not that I recall.

Id. at 54.

[redacted] conduct violated FAR 3.101-1 (giving preferential treatment to a bidder). If the telephone conversations included discussions of source selection information or contractor bid or proposal information, [redacted] would have violated criminal provisions of the Procurement Integrity Act. We have no direct evidence of the content of [redacted] conversations with [redacted] and [redacted] Circumstantial evidence suggests that [redacted] disclosed confidential source selection information to [redacted] during these calls to a potential bidder. The timing between [redacted] conversations with [redacted] and [redacted] submission of its bid appears more than mere coincidence.

F. Contemporaneous Events

Contemporaneous events enhance the significance of [redacted] call data records. In one instance, [redacted] compelling desire for consulting support to perform his [redacted] duties led him to seek [redacted] participation in a June 1st meeting with another contractor. In another example, contemporaneous events in the procurement process likely precipitated the March 10th call to [redacted]

[redacted] also attempted to have [redacted] attend a June 1, 2011 [redacted] – approximately four months prior to contract award to [redacted] actions demonstrate his pre-selection of [redacted] for the [redacted] procurement.[26] [redacted] was [redacted] on the BMC [redacted] contract. [redacted] notified 12 [redacted] personnel and one outside contractor[27] that [redacted] had scheduled a June 1st [redacted] responded to [redacted] and cc'd two individuals [redacted] who were on the Technical Evaluation Panel for the [redacted] [redacted] reply to [redacted] leaves no doubt about [redacted] pre-selection intent:

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[26] Several FTC staff stated in their OIG interviews that they knew that [redacted] favored vendor was [redacted] (e.g., statements by [redacted] during OIG investigative interviews). [redacted] pre-selection of [redacted] was also corroborated by his actions in twice attempting to procure [redacted] through a "sole source" justification. [redacted] told [redacted] and [redacted] that when [redacted] was in [redacted], he was able to procure [redacted] on a sole source justification. (Interview of [redacted] December 10, 2012).

[27] [redacted] sent the [redacted] to [redacted] also included five additional people as "cc" recipients: [redacted]

> [redacted] The support contractor I'm trying to get on board help [sic] my last organization integrate [redacted] into our business processes. I think we're close ... if we can I'll have them attend as well.

Email from [redacted] to [redacted] (May 31, 2011, 8:26 a.m.) (Attachment 6).[28] Ultimately, [redacted] did not attend the meeting because [redacted] cautioned against [redacted] proposal.

Although [redacted] was not represented at the June 1st 1:00 p.m. to 3:00 p.m. [redacted] meeting, [redacted] may have benefitted from [redacted] consulting services nonetheless. On the morning of June 1, [redacted] placed a call from his FTC desk phone to [redacted] other principal, [redacted] and spoke with her for 27 minutes. *See* Table III, *supra*. The content of that conversation remains unknown. However, the timing of [redacted] call, just hours prior to the [redacted] coupled with [redacted] explicit desire to have [redacted] participate, suggests more than mere coincidence.

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[28] [redacted] also sent his instruction to [redacted] to [redacted] and [redacted] (as "cc" recipients). We believe this demonstrates that [redacted] indeed knew that [redacted] and [redacted] were on the Technical Evaluation Panel during the May/June 2011 period (contrary to his statements to the OIG during his November 21, 2012 interview denying that he was aware of who was on the evaluation team). Other email from [redacted] to [redacted] discussed *supra*, further refutes his statement to the OIG regarding his knowledge of who was on the evaluation team in May/June 2011.

Similarly, (b)(7)(C) call to (b)(7)(C) on March 10, 2011 just before noon appears to coincide with contemporaneous events associated with the first solicitation. In early March, and thought that would qualify as a small business under Section 8(a) (referring to the corresponding section of Small Business Act which created a program to help small and disadvantaged businesses compete). Had that been the case, the FTC would have been able to retain under an expedited small business preference process. (b)(7)(C) sought to determine whether qualified as an 8(a) company. Toward that end, she requested Documentation of Prior Similar Efforts.[29] (b)(7)(C) replied to request for Documentation of Prior Similar Efforts in an email on March 10, 2011. On the same date, called (b)(7)(C) at 11:57 a.m. The content of that conversation remains unknown. However, telephone communications with principals (b)(7)(C) and/or (b)(7)(C) on dates when submitted materials to the FTC is circumstantial evidence that (b)(7)(C) compromised the integrity of the procurement process.

G. Unfair Advantage

Because disclosed information about the FTC requirement directly to (b)(7)(C) had an unfair advantage over other bidders. One criterion on which bidders were evaluated was "Offeror's understanding of requirements." *See* attachment 11 (Questions and Answers posted by Contracting Office during solicitation for RFQ (b)(7)(C) Question/Answer Nos. 27 and 32). In addition, (b)(7)(C) *de facto* engagement of (b)(7)(C) services and (b)(7)(C) pre-award substantive work for (b)(7)(C) exposed to nonpublic information that was unavailable to other bidders.

(b)(7)(C) conduct violated FAR 3.101-1 (preferential treatment for a bidder).

H. "Out of Scope" Work for Personal Benefit

(b)(7)(C) FTC hard drive contained documents that (b)(7)(C) drafted for personal benefit. (b)(7)(C) prepared these documents after the FTC contract had been awarded to The content of these documents were outside the scope of the FTC contract.

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[29] At the outset of the solicitation process, website was "a two-screen name and address site" with no information on prior work history. After (b)(7)(C) requested information from (b)(7)(C) (b)(7)(C) regarding "prior similar efforts," (b)(7)(C) website was updated to include short descriptions of the various contract work performed by (b)(7) at (b)(7)(C) direction at the (b)(7)(C) had been a civilian employee of working for (b)(7)(C) Then, (b)(7)(C) reportedly left to start his own consulting firm and began working again for (b)(7)(C) at (b)(7)(C) (as a contractor).

The out of scope work for (b)(7)(C) personal benefit primarily related to (b)(7)(C) job search efforts in 2012. In May/June and September 2012, during the base year of the contract, (b)(7)(C) drafted several resumes for (b)(7)(C) to use in applying for other (b)(7) positions in Government. In addition, (b)(7)(C) drafted a document describing (b)(7)(C) "Knowledge, Skills and Abilities." Attachment 10. When questioned about this work, (b)(7)(C) had no explanation for why [redacted] prepared the documents, stating only that (b)(7)(C) knew that (b)(7)(C) was applying for other positions and must have prepared the documents on his own initiative (and certainly not at [redacted] request). [redacted] Interview Tr. at 110-116 ("He just – he may have sent me versions of a resume and stuff, but I never asked for them.") Given the content and level of detail in the resumes and KSAs, we find (b)(7)(C) statement that (b)(7)(C) did this on his own initiative implausible. Particularly in light of the gaps and highlighted notations that sought [redacted] to supplement with specific detail.[30] [redacted] acknowledged that he was applying for other positions. *Id.*

I. Misrepresentations to OIG

1. Identities of TEP Members

During his OIG investigative interview, (b)(7)(C) made several statements that are contradicted by other investigative facts. First, (b)(7)(C) stated that he did not know the identities of individuals who were on the Technical Evaluation Panels.

Hogue: Okay. So, the statements to (b)(7) were not because he was on the panel?

(b)(7)(C) I didn't know he was on the panel.

Hogue: You didn't know he was on the panel?

(b)(7)(C) I doubt if he was.

Hogue: Mm-hmm, okay. And you had no input at all with the contracting office as to who would go on each panel?

(b)(7)(C) No, I did not.

Hogue: You were not involved?

(b)(7)(C) No.

(b)(7)(C) Interview Tr. at 40-41.

[30] The resumes include yellow highlighted comments imbedded in the document that were marked for (b)(7)(C) supplemental information (e.g., more descriptive information about specific projects, lengths of service, budget authority, etc.).

2. [redacted] Role in Appointing TEP Members

Second, (b)(7)(C) falsely stated that he did not have any input with the contracting office regarding who would be on the technical evaluation panels.

(b)(7)(C) not only knew who was on the TEP, but he selected (b)(7)(C) to be the [redacted] and the lead on the TEP. (b)(7)(C) Interview (December 10, 2012) (The (b)(7)(C) Appointment letter from the (b)(7)(C) to [redacted] explicitly stated that (b)(7)(C) had nominated (b)(7)(C) to fulfill the (b)(7)(C) duties, which included leading the TEP that was responsible for evaluating bids). In addition to (b)(7)(C) statements to the OIG, (b)(7)(C) denial of knowing who was on the TEP is belied by his own statements in an email to Christie on June 13, 2011. [redacted] explicitly stated, [redacted] and (b)(7)(C) are at the ready.") Attachment 5. (b)(7)(C) statement that he did not have any role in selection of TEP members is further contradicted by an email from (b)(7)(C) to (b)(7)(C) wherein she solicited (b)(7)(C) suggestions for TEP members after (b)(7)(C) retired. *See* Attachment 4.

3. [redacted] Statements Indicating Pre-Selection of [redacted]

Third, (b)(7)(C) denied that he made statements that indicated his preference for (b)(7)(C) firm, [redacted], to be awarded the contract.

Hogue: Okay. And did you ever tell any member of your staff which bidder you wanted the contract to be awarded to?

(b)(7)(C) What do you mean? Like pick these or I'm going to fire you kind of thing? No.

Hogue: No, I didn't say that. I said, did you ever tell any of the technical evaluation panel participants, who were on your staff, which bidder you wanted the contract to be awarded to?

(b)(7)(C) No.

Hogue: You never said to them, this is the smartest man I know, what's taking so long, I want him here?

(b)(7)(C) I referred to (b)(7)(C) as one of the smartest guys I know in the business after he was aboard and working with my staff.

Hogue: But not prior to his arrival?

(b)(7)(C) No.

Hogue: So, it would not have been prior to (b)(7)(C)

(b)(7)(C) Right.

Hogue: That's the date that it was awarded to him.

(b)(7)(C) Right.

(b)(7)(C) Interview Tr. at 41. The OIG learned from (b)(7)(C) that (b)(7)(C) stated that (b)(7)(C) was "the smartest person I ever met" prior to the award. Interview of (b)(7)(C) (June 30, 2011).

4. No Knowledge of When Bids Were Due to FTC

(b)(7)(C) told the OIG that he did not know when bids were due and that his telephone conversation with (b)(7)(C) on the day that bids were due was pure coincidence:

Hogue: Okay. So, you contacted Mr. (b)(7)(C) cell phone on (b)(7)(C) at 3:49 pm., on the same date that he submitted his bid to the FTC. Why did you do that? You called him.

(b)(7)(C) I have no idea.

Hogue: Mm-hmm. Do you doubt that you did that?

(b)(7)(C) Why would I doubt it?

Hogue: Okay. It doesn't look good, you're contacting a prospective bidder on the date that he submits his bid.

(b)(7)(C) Okay. How did I know he was submitting his bid? How would I know that?

Hogue: You didn't know that he was submitting a bid, is that what you're saying?

(b)(7)(C) No, I knew he was going to bid for this contract. I asked him to. Did I know when he submitted his bid? No, how would I know that?

Hogue: You didn't know when the bids were due?

(b)(7)(C) No.

Hogue: You had no idea when the bids were due?

(b)(7)(C) No.

Hogue: Okay, thank you. So, its's just pure coincidence then that you called him within two hours of his submission of his bid?

(b)(7)(C) Yeah, pure coincidence.

Hogue: Okay. And you understand that this was a confidential sealed bid process?

(b)(7)(C) I do now, yes.

Hogue: But you didn't understand that that day?

(b)(7)(C) No, I didn't understand that that day.

Hogue: Okay. And then how - -

(b)(7)(C) Those are details I don't really worry about; someone else does.

Hogue: Right. You don't worry about them?

(b)(7)(C) No.

Hogue: Hmm. So, how was it that you were first informed that it was a confidential sealed bid process?

(b)(7)(C) About 20 minutes ago when you told me.

Hogue: Okay. Prior to my telling you, you didn't know that?

(b)(7)(C) No.

Hogue: Okay. Never came up in the FAR training you got?

(b)(7)(C) Not that I recall.

(b)(7)(C) Interview Tr. at 53-54.

5. [redacted] Was Disqualified because [redacted] Disclosed Pricing Information

(b)(7)(C) stated that during one of the solicitations, (b)(7) was disqualified by the (b)(7)(C) because (b)(7)(C) had disclosed sensitive pricing information to (b)(7)(C) during the solicitation phase. (b)(7)(C) Interview Tr. at 28. This statement was contradicted by (b)(7)(C) and (b)(7)(C) The OIG found no records to substantiate [redacted] statements.

III. Discussion and Analysis

The investigative facts fall into two categories: direct and circumstantial. We have

direct evidence of (1) [redacted] substantive FTC work pre-award; (2) [redacted] attempts to have [redacted] attend multiple meetings during the solicitation phase of the procurement; (3) [redacted] call data records documenting communications with [redacted] principals ([redacted] and [redacted] including conversations that correspond to contemporaneous events in the procurement; (4) [redacted] statements indicating that he wanted [redacted] to be awarded the contract; (5) [redacted] interference with the procurement process; (6) [redacted] pattern of directing that the solicitation be cancelled when the TEP lacked adequate justification to select [redacted] (7) [redacted] out-of-scope work that was a personal benefit to [redacted] and (8) [redacted] bid virtually matched the IGCE.

Although we have direct evidence of telephone conversations between [redacted] and [redacted] principals, we do not know the content of those conversations. We have only circumstantial evidence that [redacted] disclosed non-public source selection information to [redacted] during those conversations. This inference is reasonable in light of evidence of [redacted] pre-selection of [redacted] (*e.g.*, statements in the presence of [redacted] that [redacted] is "the smartest man I know;" efforts to have [redacted] attend FTC meetings pre-award; substantive FTC work performed by [redacted] at [redacted] request during the solicitation phase of the procurement, etc.). On one hand, [redacted] elicited assistance from [redacted] to expedite progress on the procurement. Though [redacted] emphasized the importance of assuring the integrity of the procurement process, [redacted] actions flouted [redacted] direct admonitions. Forensic evidence reveals that [redacted] received electronic documents authored by [redacted] via email. [redacted] then saved the electronic files under his own name before circulating the electronic files to his staff and other agency personnel. All the while, [redacted] purported that the work was his own.[31] [redacted] efforts to save the documents under his own name demonstrates both (1) his knowledge that his conduct was improper and (2) his objective to conceal his pre-selection intent. *Assuming arguendo* that [redacted] motive was to enhance perceptions of his competency, his actions to afford [redacted] with preferential treatment are not negated. Amid recurring reminders from his staff regarding the integrity of the procurement process, [redacted] continued to surreptitiously engage [redacted] to perform substantive FTC work. [redacted] stated in his investigative interview that he did not know that the procurement required a sealed bid process. This statement lacks credibility for two reasons: (1) he acknowledged having been trained in the FAR during his tenure at [redacted]; and (2) he undertook extensive covert efforts to engage [redacted] consulting services and disguised [redacted] work product as his own. Drawing an inference that [redacted] disclosed non-public source selection information to [redacted] principals in known telephone conversations is both reasonable and entirely consistent with the foregoing investigative facts. [redacted] blatant disregard for the integrity of the procurement process predicates this inference.

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[31] Initially, [redacted] circulated [redacted] work product directly to [redacted] without changing the metadata to make it appear that [redacted] had authored the work product. After [redacted] advised [redacted] that it would be improper for [redacted] to perform services for the FTC, [redacted] began to alter the metadata on [redacted] work product prior to circulating to other FTC personnel.

The IGCE would have been non-public information that should not have been disclosed to a single bidder. Likewise, information regarding the number of bids received and the amount of those bids should not have been disclosed to any bidder. [redacted] 3:49 p.m. call to [redacted] – placed just two minutes after receiving a call from a blocked number – presented the opportunity to disclose such confidential source selection information to [redacted] favored vendor. [redacted] creation of the bid document just 17 minutes after the call with [redacted] ended corroborates this inference. For four months, [redacted] had been ignoring procurement rules, covertly engaging [redacted] consulting services and telling his staff that [redacted] was the contractor that he wanted to "bring on board." Disclosing the IGCE and/or information about bids received would be fully consistent with [redacted] prior conduct.

[redacted] disclosure of the IGCE and/or information about bids received in the [redacted] call to [redacted] violated the Procurement Integrity Act. The Procurement Integrity Act prohibits inappropriate disclosure of either (a) contractor bid or proposal information or (b) source selection information at any point in the acquisition process. The investigative facts substantiate the conclusion that [redacted] disclosed prohibited information to [redacted] in violation of the Procurement Integrity Act.

[redacted] conduct also violated provisions of the FAR. [redacted] pre-selection, deceptive actions in retaining [redacted] "off the books," and disclosure of sensitive information flouted the FAR's requirement that "Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none." FAR 3.101-1; *see also* FAR 3.104.4(a). In addition, having [redacted] prepare out-of-scope work for [redacted] personal benefit (*e.g.*, resumes and KSAs) violated both the FAR and Government-wide Standards of Conduct. 5 C.F.R. 2635.703 Conduct of the [redacted] personnel should be above reproach. [redacted] actions fell below that standard.

[redacted] *de facto* engagement of [redacted] consulting services, circumventing the procurement process, violated the agency's policy. Only the Executive Director, CFO and Acquisitions staff have the delegated authority to obligate the FTC to spend appropriated funds for goods and services. FTC Administrative Manual Ch. 2, Sec. 300. When [redacted] engaged [redacted] services "off the books," [redacted] believed that it did not cost the Government anything. However, when [redacted] performed these services, [redacted] conduct created an obligation on the part of the Government to compensate [redacted] for the services performed for the benefit of the FTC. [redacted] had a right to make a claim against the Government for the services performed. Had he exercised his right, the unauthorized commitment would either be ratified by the agency and paid with appropriated funds or non-ratified and [redacted] would be personally liable for payment. FAR 1.602-3.[32]

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[32] Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel. FAR 1.602-3(b)(1).

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

April 24, 2013

MEMORANDUM

To: Nathaniel C. Wood
Assistant Director
BCP Consumer and Business Education

Byron Howard
Human Resources Specialist
Employee and Labor Relations

From: Dena Davis
Lead Investigator

RE: Investigative Referral (I-13-170)

The Office of Inspector General (OIG) has completed its investigation into the October 11, 2012, allegation of misuse of a government travel card by (b)(7)(C) The investigation revealed that (b)(7)(C) used her government issued Citibank travel card for personal use. Additionally, (b)(7)(C) took cash advances against the card. These transactions were not associated with any authorized government travel. The OIG is referring this matter to management for any disciplinary action it deems appropriate.

Background & Findings

On October 2, 2012, [redacted] issued a memorandum to [redacted] advising her that an audit identified her travel card account as past due with an outstanding balance of $1,706.79, resulting in a suspension of her account. Additionally, there were no recent travel authorizations on file for [redacted]

On October 11, 2012, (b)(7)(D) (b)(7)(D) notified this office of the aforementioned allegations. (b)(7)(D) provided eight Citibank monthly account statements for [redacted] government travel card. A review of the statements revealed that (b)(7)(C) made purchases unrelated to official government travel as far back as September 2010. (b)(7)(C) also took cash advances against the card that were unrelated to official government travel.

On November 30, 2012, following initial contact with this office, [redacted] made a payment of $920.75, bringing her account balance to $0.00.

On April 22, 2013, [redacted] was issued a Garrity Warning, advising her of her requirement to cooperate with this investigation. [redacted] provided a sworn, written statement admitting to using her government issued Citibank travel card for purchases unrelated to official government travel. [redacted] states that she used the card to purchase things she need/wanted such as gas, groceries, take-out food and drug store items that she did not have money for due to her difficulty in managing her own personal finances. [redacted] also took cash advances against the card for personal use.

Discussion

[redacted] failed to adhere to 41 C.F.R. 301-51.6, which requires that the Government contractor-issued travel charge card only be used for expenses directly related to official travel. Prior to being issued a government travel card, [redacted] signed the Employee Acknowledgement of Policy Regarding Use of Government Travel Credit card issued by the FTC Office of Financial Management and she completed the course requirements for the GSA SmartPay Travel Card Program. As of April 24, 2013, [redacted] travel card account is closed.

Conclusion

[redacted] was adequately trained in the policies and procedures as they relate to use of her government issued Citibank travel card. [redacted] failed to follow the Commission's policies and procedures as they relate to the use of a government travel card. [redacted] failure to adhere to these policies resulted in her account falling delinquent, initially being suspended and subsequently being closed. [redacted] did pay the remaining balance of the card following her initial contact with this office.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

April 24, 2013

MEMORANDUM

To: File

From: Dena Davis
Lead Investigator

RE: Closing memo (I-13-170)

On April 24, 2013, investigative work ended in connection with the October 11, 2012, allegation of misuse of a government travel card by (b)(7)(C)

(b)(7)(D) reported that (b)(7) has been using her government travel card for purchases that are unrelated to official FTC travel. This is a violation of Federal Travel Regulations and the Citibank User's Agreement. (b)(7)(D) submitted eight Citibank travel card monthly statements showing (b)(7)(C misuse dating back to December 20, 2011. (b)(7)(C card was suspended upon discovery of the abuse.

Our investigation revealed that (b)(7) began using her government issued Citibank travel card to make unauthorized personal purchases as far back as September 2010. Purchases made by (b)(7) included gas, fast food and groceries in addition to taking cash advances from the card.

On April 22, 2013, (b)(7) was issued a Garrity Warning, advising her of her duty to cooperate with this investigation. (b)(7) provided this office with a sworn, written statement admitting to using her government issued travel card for personal purchases.

APPROVED:

Scott Wilson

Scott E. Wilson, Inspector General

REPORT OF INVESTIGATION

ADMINISTRATIVE DATA

Subject: (b)(7)(C)
(b)(7)(C)

Allegation: Misuse of Government Travel Card

OIG Case File: I-13-170

Date of Report: April 24, 2013

Prepared by: _____
Dena N. Davis, Lead Investigator

Approved by: _____
Scott E. Wilson, Inspector General

Allegation

This case is predicated on the October 11, 2012, allegation by [redacted] that [redacted] misused her government issued Citibank travel card by making purchases not related to official government travel.

Prohibitions

41 C.F.R. 301-51.6 requires that the Government contractor-issued travel charge card only be used for expenses directly related to official travel.

Details

On October 4, 2012, [redacted] issued a memorandum to [redacted] advising her that an audit identified her travel card account as past due with an outstanding balance of $1,706.79, resulting in suspension of her account. Additionally, there were no recent travel authorizations on file for [redacted]

On October 11, 2012, [redacted] reported suspected travel card misuse by [redacted] to this office. Additionally, [redacted] provided eight Citibank travel card monthly statements for [redacted] account to this office for review. Review of the documents revealed that [redacted] has been using her government issued Citibank travel card for personal purchases since September 2010[1].

On April 22, 2013, [redacted] was issued a Garrity Warning, advising her of her requirement to cooperate in this investigation. [redacted] provided a sworn, written statement admitting to using her government issued Citibank travel card to make personal purchases not related to official government travel[2].

In her statement, [redacted] related that she used the card because she needed/ wanted items such as groceries, take out, gas and drug store items that she did not have money for due to her own difficulty managing her personal finances. In addition to unauthorized purchases, [redacted] took cash advances against the card.

On May 26, 2010, [redacted] signed the Employee Acknowledgement of Policy Regarding Use of Government Travel Credit Card issued by the FTC Office of Financial Management and completed the course requirements for the GSA SmartPay Travel Card program[3].

On November 30, 2012, [redacted] paid the remaining balance on the card[4].

On April 24, 2013, [redacted] government issued Citibank travel card was closed.

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[1] Exhibit 1: [redacted] handwritten, sworn statement .
[2] Exhibit 2: Citibank statements showing personal charges made by [redacted]
[3] Exhibit 3: Employee acknowledgement of travel card policy and training certificate.
[4] Exhibit 4: Citibank statement showing final payment on [redacted] account.

Findings

Evidence was found to support the allegations against (b)(7)(Additionally, (b)(7) provided a sworn, written statement admitting that she misused her Citibank issued government travel card by making purchases not related to official government travel.

Conclusion

(b)(7) failed to adhere to FTC regulations regarding the use of credit cards issued for official FTC travel. Her failure to do so resulted in her account being suspended. At the time of suspension, (b)(7) had an outstanding balance of $1,706.79. On November 30, 2012, (b)(7) made a final payment of $920.75, which brought the balance of the card to $0.00.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

May 20, 2013

MEMORANDUM

To: File

From: Dena Davis
Lead Investigator

RE: Closing memo (I-13-171)

On May 13, 2013, investigative work ended in connection with the January 7, 2013, allegation of False Personation by [redacted] citizen.

On January 7, 2013, [redacted] an email he received from [redacted] The email alleged that [redacted] filed court papers in the United States District Court in Phoenix, Arizona signing his [redacted] name as a representative of the FTC.

[redacted] also sent emails containing the same documents he filed in court to [redacted] and [redacted] directing them to get the documents filed. [redacted] is seeking an injunction against [redacted] as well as others for violation of the FTC Act, 15 U.S.C. § 45(a), which prohibits "unfair or deceptive acts and practices in or affecting commerce".

Contact was made with [redacted] and [redacted] stated that he was putting together a grand jury packet against [redacted] seeking state charges for stalking, harassment and tampering with a public record. [redacted] was seeking an extraditable warrant in order to have [redacted] returned to Arizona from his home in Michigan.

[redacted] made contact with [redacted] on a previous occasion in an attempt to discourage him from pursuing his current activities to no avail.

On February 14, 2013, [redacted] sent a bouquet of roses to [redacted] with a card attached inviting her to come and see him. Following this incident, [redacted] requested that the prosecutor make this matter a priority.

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[1] The FTC filed a lawsuit against [redacted] in 2008 and settled in 2010.

On May 13, 2013, [redacted] was arrested in Michigan by United States Postal Inspectors from Alaska for Mail Fraud. A rule hearing was held and the judge signed an order moving [redacted] from Michigan to Alaska to stand trial.

No further action is required in this matter; this case is closed.

APPROVED:

Scott Wilson

Scott E. Wilson, Inspector General

REPORT OF INVESTIGATION

ADMINISTRATIVE DATA

Subject: (b)(7)(C) [redacted]

Allegation: False Personation of an Officer or employee of the United States (18 U.S.C. 912)

OIG Case File: I-13-171

Date of Report: May 20, 2013

Prepared by: _____
Dena N. Davis, Lead Investigator

Approved by: _____
Scott E. Wilson, Inspector General

Allegation

This case is predicated on the January 7, 2013, an allegation by (b)(7)(D) (b)(7)(D) that civilian, filed court papers in United States District Court in Phoenix, Arizona using his name as a representative of the FTC.

Prohibitions

18 U.S.C. 912, False personation, establishes that "*whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such , or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years or both*".

Details

On January 7, 2013, forwarded an email he received from (b)(7)(D) The email details the activities of and his attempts to get the FTC to file action against (b)(7)(C), as well as others, for telemarketing and consumer fraud. (b)(7)(C) submitted documents to the court under (b)(7)(D) signature.

Additionally, (b)(7)(C) forwarded the same documents to (b)(7)(D) and (b)(7)(C) (b)(7)(C) directing them to get the documents filed.

Contact was made with (b)(7)(C) and (b)(7)(C) (b)(7)(C) stated that he was putting together a grand jury packet on (b)(7)(C) seeking state charges for stalking, harassment and tampering with a public record. (b)(7)(C) was seeking an extraditable warrant in order to have (b)(7)(C) returned to Arizona from his home in Michigan.

(b)(7)(C) made contact with (b)(7)(C) on a previous occasion in an attempt to discourage him for pursuing his current activities to no avail.

On February 14, 2013, sent a bouquet of roses to with a card attached inviting her to come and see him[2]. Following this incident, requested that the prosecutor make this matter a priority.

Conclusion

On May 13, 2013, (b)(7)(C) was arrested in Michigan by United States Postal Inspectors from Alaska for Mail Fraud. A rule hearing was held and the judge signed an order moving (b)(7)(C) from Michigan to Alaska to stand trial.

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[1] The FTC filed a lawsuit against (b)(7)(C) in 2008 and settled in 2010.

[2] Exhibit 1: copy of card that came with the roses.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Inspector General

December 3, 2013

MEMORANDUM

To: Scott Wilson
Inspector General

File

From: Kelly Tshibaka
Chief Investigator

RE: Closing Memorandum for Investigation I-14-172

On November 5, the Office of Inspector General (OIG) received an allegation that (b)(7)(C) and his subordinates, (b)(7)(C) committed a prohibited personnel practice with respect to a hiring action for a (b)(7)(D) Specifically, (b)(7)(C) allegedly led job applicant (b)(7)(D) (b)(7)(D) a preference candidate (veteran) who was determined by the Human Capital Management Office (HCMO) to be qualified and placed on the [redacted] selection certificate, to withdraw his application for the position even though he met the minimum qualifications required.

Given the sensitive nature of the allegation and the involvement of (b)(7)(C) (b)(7)(C) the OIG opened an investigation into the allegations. The OIG interviewed (b)(7)(C) (b)(7)(C) in the (b)(7)(C) (b)(7)(C) and (b)(7)(D) the preference candidate. The OIG also reviewed e-mails, draft and finalized position descriptions and vacancy announcements, and notes and rating sheets generated by DPI of the candidates for this position.

The OIG conducted this investigation very quickly so as to avoid any potential additional prohibited personnel practices (such as not taking corrective action in the timeframes required). The plan of action, findings, and draft ROIs were reviewed and approved by the Inspector General. Oversight also was provided through ongoing updates and discussion between the Inspector General and Chief Investigator.

The OIG did not substantiate the allegations that [redacted] committed a prohibited personnel practice. However, the OIG identified areas for improvement to prevent similar incidents from occurring in the future and has drafted a Management Advisory to communicate these recommendations to management.

On November 26, the Report of Investigation was completed and transmitted to the Chief of Staff, Principal Deputy General Counsel, and Director of HCMO, per the OIG's policy. This was the effective date of closure of the investigation.

FEDERAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

REPORT OF INVESTIGATION
regarding
ALLEGATION OF PROHBITED PERSONNEL PRACTICE IN BCP DPI

File No. I-14-172

ORIGINAL
November 2013

I. Background

The Office of Inspector General (OIG) investigated an allegation that [redacted] committed a prohibited personnel practice with respect to a hiring action for a [redacted]. Specifically, [redacted] allegedly led job applicant [redacted] a preference candidate (veteran) who was determined by the Human Capital Management Office (HCMO) to be qualified and placed on the [redacted] selection certificate, to withdraw his application for the position even though he met the minimum qualifications required. This Report of Investigation (ROI) describes the OIG's findings from the investigation.

[redacted] has served for approximately 8 years as the [redacted] He is in the [redacted] and he estimates he has overseen more than 100 hiring actions while in his current position. [redacted] has served as the [redacted] for approximately 5 years, and she reports directly to [redacted] She is a [redacted] and she estimates she has overseen approximately 20 hiring actions at the FTC. [redacted] has served as [redacted] since December 2012. Prior to that, she was [redacted] She estimates she previously has interviewed and rated job applicants three times, and she currently is a [redacted] reporting directly to [redacted]

To conduct this investigation, the OIG interviewed [redacted], and [redacted] and [redacted] the preference candidate. The OIG also reviewed e-mails, draft and finalized position descriptions and vacancy announcements, and notes and rating sheets generated by [redacted] of the candidates for this position.

II. Position Description and Vacancy Announcement

E-mails show that [redacted] collaborated with [redacted] to revise the position description for this vacancy before advertising it. In interviews with the OIG, [redacted] and [redacted] explained that the data analysts did not provide support to litigation cases prior to 2 or 3 years ago. However, litigation support is now a significant part of the position and analysis for those cases is performed using Microsoft SQL Server (SQL).[1] As a result, [redacted] said he confirmed with [redacted] that the revised position description included experience in SQL because this was critical for the job. The revised position description for the [redacted] included the following:

[1] SQL is a relational database management system whose primary function is to store and retrieve data as requested by other software applications.

- "Routinely utilizes Business Objects, MS SQL Server, and MS Access to conduct searches of the various data banks and is the primary [redacted] point of contact on the use of that software,"
- "Support division and regional office litigation needs in analyzing evidence gathered during the course of investigations *including SQL data, spreadsheets, and text documents*" (italicized language added as part of the revision), and
- "Must have expert knowledge of a variety of applications including *MS SQL Server, MS Access, Business Objects, and other database and spreadsheet packages*" (italicized language added as part of the revision).

(b)(7)(C) drafted the vacancy announcement based on the revised position descriptions. The vacancy announcement stated that the selected candidate would perform several enumerated duties, including:

- "Support division and regional office litigation needs in analyzing evidence gathered during the course of investigations including SQL data, spreadsheets, and text documents."
- "Routinely utilizes Business Objects, MS SQL Server, and MS Access to conduct searches of the various data banks and is the primary BCP point of contact on the use of that software."

The vacancy announcement also stated that applicants would not be considered unless they identified experience which demonstrates that they meet the following selective factors:

- "Applicants must have demonstrated experience using business intelligence software and/or MS SQL Server software to build and execute data queries against databases with large volumes of data, extract data sets for analysis, and present data findings in the form of a report."
- "Applicants must have demonstrated experience supporting litigation cases through analysis of data and other evidence gathered during the course of the investigations."

According to both (b)(7)(C) HCMO required the vacancy announcement to use "and/or" in the requirement that applicants demonstrate experience using "business intelligence software and/or MS SQL Server software." According to (b)(7)(C) [redacted] a candidate would not be able to perform the duties of the job without demonstrated experience using SQL since the majority of the work in the position would be providing litigation support, for which the FTC uses SQL to analyze data. However, HCMO precluded [redacted] from identifying SQL as a necessary qualification for this position because vacancy announcements cannot be restricted to a candidate's experience in one brand or product.[2] (b)(7)(C) said that HCMO added the "and/or" qualifier in case there was another program that is similar to SQL. However, [redacted] explained that while it would be

[2] The requirement that the vacancy announcement be open to more than just candidates with SQL proficiency comes from an OPM Government-wide standard that competition be open and fair.

theoretically possible for a candidate to have a sufficient breadth of experience in a business intelligence software aside from SQL that he/she could perform the data analyst job, it was extremely unlikely because proficiency in SQL is a critical part of the position.

(b)(7)(C) said he made (b)(7)(C) aware of the critical need for the selected candidate to have experience using SQL because of the substantial litigation support the selected candidate would be providing. For that reason, HCMO and (b)(7) added the two selective factors which candidates would have to demonstrate or else be deemed unqualified for the position. stated that the first selective factor, "Applicants must have demonstrated experience using business intelligence software and/or MS SQL Server software…," meant that experience in conducting SQL data queries was essential to performing the job. Similarly, (b)(7)(C) understood the vacancy announcement to contain strong language requiring experience with SQL (e.g., the incumbent would be the primary point of contact for MS SQL, would regularly use MS SQL Server, and must have demonstrated experience using business intelligence software and/or MS SQL Server software).

The vacancy announcement was advertised four ways: 1) Merit promotion GS-9, 2) Delegated Examining Unit (DEU) GS-9, 3) Merit promotion GS-11, and 4) DEU GS-11. This resulted in four selection certificates being issued for the single vacancy.

(b)(7)(D) applied for the vacancy announcement. (b)(7)(D) is a preference candidate (veteran) who HCMO determined met the qualifications of the position as advertised in the vacancy announcement. According to HCMO considers training to be relevant experience sufficient to meet the selective factor requirement that applicants "demonstrate experience using…MS SQL Server software." Since (b)(7)(D) received training in SQL in 2006 and identified "SQL /VB Training with practical application Usage" as software experience, determined that he met the qualification requirements for the position.

Other qualified candidates also applied for the (b)(7) certificate, but, according to (b)(7)(C) could not receive the other (b)(7)(D) candidates' applications unless (b)(7)(D) withdrew his application, or (b)(7) determined he was not qualified for the position and HCMO agreed with (b)(7) assessment. However, (b)(7) could select any of the candidates from the other three certificates instead of (b)(7)(D) (b)(7) was not required to select a preference candidate from one certificate (in this case, the (b)(7)(D) over a non-preference candidate from one of the other certificates.

III. Applicant Screening Process

The four certificates resulted in 12 candidates for (b)(7) to review. According to asked her to review and rank the candidates' applications. (b)(7)(C) used a spreadsheet of critical skills used in the job and provided a subjective assessment of the skills presented on a scale of 1-5 (1 being low and 5 being high). ranking of the

candidates did not identify [redacted] as the most qualified, but did place him in the top 3 of the 12 candidates who applied. All of the candidates received low rankings, and the top 3 candidates received a total of 9, 7, and 7 points, respectively, out of a possible 25 points.

[redacted] discussed the candidates and [redacted] ranking of them. [redacted] also independently reviewed each candidate's application. According to [redacted] he, [redacted] agreed that [redacted] written application seemed to meet the basic qualifications of the vacancy announcement as advertised, but they were unsure that he would have the level of experience necessary to meet the job requirements. [redacted] said he asked [redacted] and [redacted] to interview [redacted] explain the job, and be clear about the requirements. He also said that he instructed [redacted] and [redacted] that if [redacted] did not have sufficient SQL experience, then they should ask him to withdraw his application.

[redacted] said he understood from past hiring decisions and from HCMO that a preference candidate can only be bypassed on the certificate two ways: 1) if the hiring official determines in the interview and by information gathered that the preference candidate lied on his/her resume, or 2) if the candidate withdraws his/her application. Without one of these two actions occurring, [redacted] did not believe a non-qualified preference candidate could be bypassed for other qualified non-preference candidates on the certificate. [redacted] recalled at least one other occasion in [redacted] in which a preference candidate removed his/her application from consideration because he/she was not qualified.

[redacted] said that HCMO never has advised selecting officials to ask a preference candidate to withdraw their application if the selecting official believes the candidate is not qualified. In contrast, [redacted] said the practice in the FTC is for selecting officials to contact HCMO if they believe a candidate on the certificate is not truly qualified. HCMO then makes the decision about whether to remove the candidate from the certificate. [redacted] also said that [redacted] has not hesitated to call her in the past if he believed someone truly was not qualified, and his actions in this instance were different from how he has handled similar instances in the past.

IV. [redacted] Interview Process

[redacted] and [redacted] performed telephonic interviews of the top 3 ranked candidates. The objective of their interview was to perform an initial screening and assessment of the candidates. Prior to the interviews, they agreed that [redacted] would open the interviews by providing a brief overview of the FTC, [redacted] and the position. [redacted] would then ask the more technical questions to assess the candidates' level of experience and technical proficiency, starting with questions about SQL coding since the data analysts work in a SQL environment. Any candidate that demonstrated the experience and qualifications necessary for the position would then receive a telephonic interview with [redacted]

(b)(7)(C) and (b)(7)(C) interviewed (b)(7)(D) via telephone on Friday, November 1, 2013. After providing the overview of the agency, division, and position, recalled explaining to (b)(7)(D) that the position required SQL coding experience because the data analysts work substantially with SQL Server Management Studio. She recalled explaining to (b)(7)(D) that SQL is the environment in which the analysts work and a tool they commonly use to construct queries to analyze data acquired during the course of investigations. According to (b)(7)(C) and communicated candidly that he had no SQL server code writing experience, does not do SQL programming, and had no knowledge of how to do what (b)(7)(C) was describing.

According to both (b)(7)(C) and (b)(7)(C) then resumed the interview by thanking (b)(7)(D) for applying and stating that unfortunately, the position required SQL experience. She then asked him if he would mind sending an e-mail requesting his application be withdrawn. According to both (b)(7)(C) and readily agreed.

(b)(7)(C) has hired qualified preference candidates (veterans) in the past and stated that this was the first time she ever has requested a preference candidate to withdraw his application. She said that prior to this position being advertised, she understood that if she determined that a preference candidate on the certificate was not qualified for the position, she was supposed to request he/she withdraw his/her application. In contrast, if a non-preference candidate was not qualified, she believed no action was necessary and the interviewers could consider other qualified candidates in the certificate. She said she developed this understanding based on her knowledge of hiring practices at the FTC and her observations of what colleagues in other offices had done in similar circumstances. According to (b)(7)(C) she thought it was appropriate and accurate for her to request (b)(7)(D) to withdraw his application because he was so forthcoming about his lack of experience and therefore clearly was not qualified for the position.

(b)(7)(C) had an interview scheduled with following (b)(7)(C) and (b)(7)(C) interview. However, that interview did not occur because (b)(7)(C) and (b)(7)(C) determined that was not qualified for the position.

In an interview with the OIG, (b)(7)(D) said that during his interview, (b)(7)(C) began the questioning by explaining that the core of the job required writing SQL codes and asked if he had experience as an SQL code writer. He said he told (b)(7)(C) that he took training in SQL, but did not know how to write SQL codes. He said (b)(7)(C) did not say that the position required the candidate to be certified in SQL but to be able to write SQL codes. He said he was then asked to send an e-mail saying that he wanted to withdraw his application from the position. He agreed to do so because he understood that he did not have experience writing SQL codes. He also said the interviewers advised he apply for an investigator position when it becomes available because of his law enforcement experience. (b)(7)(D) said the only reason he withdrew his application is because the interviewers asked him to do so. (b)(7)(D) said the interview was very quick and lasted no more than 5 minutes.

V. Post-Interview Events

[redacted] sent an e-mail to [redacted] Friday, November 1, 2013, following his interview that stated:

> "Good afternoon [redacted] Thank you kindly for your time during the interview. As result *[sic]*, please withdraw my application for consideration. Sincerely, [redacted]

[redacted] forwarded the email to [redacted] and [redacted], then sent an e-mail to [redacted] with a copy to [redacted] and [redacted], stating:

> [redacted] We have been interviewing candidates for our data analyst job posting. The [redacted] cert included only one applicant, [redacted] who had veterans' preference. As you can see below, [redacted] has now withdrawn his application after hearing about and understanding the requirements of this position, which we discussed with him during his interview.
>
> "Is it now possible for us to review the applications of other qualified [redacted] candidates at [redacted] grade? Thanks, [redacted]

After receiving the e-mail, [redacted] called [redacted] to verify his decision to withdraw his application before taking his name off the certificate. According to [redacted] this is standard practice in HCMO. [redacted] said that [redacted] told her that the interviewers recommended he withdraw his application because he had some experience with SQL, but is not proficient, and that he has training in SQL but does not have the certification. [redacted] noted that certification in SQL was not required in the vacancy announcement, and she told [redacted] she would speak with a supervisor about what he was told before they would remove him from the certificate.

According to [redacted] there is no certifying agency for SQL so it is unclear what "certification in SQL" means. [redacted] said [redacted] did not require candidates to be "certified" in SQL, and that "certification" was not necessary to an individual being able to perform the SQL functions of the job.

Following their interview with [redacted] interviewed via telephone the other top two candidates, including the top ranked candidate, [redacted] According to both [redacted] asked [redacted] questions about her experience with SQL first, just as she did with [redacted] was able to demonstrate knowledge of SQL data extraction, conducting SQL searches, and a general proficiency and capability with SQL, even though she only received a "2" from [redacted] review of her SQL/Technical background as reflected in her written application. After asking some additional questions, [redacted] and [redacted] concluded their interview, and

(b)(7)(C) had a follow-up interview with (b)(7)(C) At the time of this investigation, (b)(7)(C) were in the process of checking [redacted] references but were disinclined to extend her an offer based on feedback they received thus far.

VI. Applicable Standards

5 U.S.C. § 2302(b)(5) prohibits a federal employee who has authority over personnel decisions from influencing anyone to withdraw from competition in an effort to improve or injure the employment prospects of any person. There are two elements that both must be present for a person to violate this provision: 1) the individual must have influenced or attempted to influence a person to withdraw from competition, and 2) the person must have done so with the intent to improve or injure someone's employment prospects, which encompasses injuring the withdrawing candidate's employment prospects.[3] However, according to the Merit Systems Protection Board, 5 U.S.C. § 2302(b)(5) does not prohibit a government employee from counseling an applicant to withdraw his/her application for a legitimate reason, as where the employee does not feel that the applicant is qualified, or where a better position is available.[4]

If a preferred candidate meets the basic qualifications of the position for which he/she has applied, then OPM regulations require the candidate's selection. *See* 5 C.F.R. §§ 330.305(b) and 332.406(c) and (d). According to (b)(7)(C) hiring officials cannot change the basic qualifications of a position in the middle of the hiring process. They either must select someone on the certificate as advertised or close the vacancy and re-advertise it with the revised requirements.

VII. Findings

The OIG did not substantiate the allegations that [redacted] committed a prohibited personnel practice for the following reasons:

A. (b)(7)(C) did not intend to improve or injure someone's employment prospects.

The evidence did not show that (b)(7)(C) intended to injure (b)(7)(C) employment prospects or improve the employment prospects of another candidate on the certificate. (b)(7)(C) was rated along with 11 other candidates from the other 3 certificates. In a rating based on qualifications, he ranked in the top three candidates, and (b)(7)(C) subjective assessment of his skills and abilities was qualitatively equivalent to those she gave to other candidates. (b)(7)(C) was interviewed using the same questions and methodology as used with other candidates. (b)(7)(C) also had

[3] *Special Counsel v. Brown*, 61 M.S.P.R. 559, 563 and 565 (1994); *Filiberti v. Merit Systems Protection Board*, 804 F.2d 1504 (9th Cir. 1986).
[4] http://www.mspb.gov/ppp/ppp.htm; *see Filiberti*, 804 F.2d at 1510.

previously arranged a follow-up interview for [redacted] with [redacted] if his interview with [redacted] and [redacted] demonstrated he had the requisite qualifications for the position.

[redacted] also did not demonstrate intent to injure [redacted] employment prospects when they requested he withdraw his application. They were permitted to do so because they did not feel [redacted] was qualified. In addition, based on past hiring decisions, practices observed in other FTC offices, and their understanding of guidance from HCMO, [redacted] believed they were supposed to request [redacted] to withdraw his application if they determined he was not qualified for the position even though his application was part of the [redacted] certificate.

In addition, the evidence did not show that [redacted] intended to improve another candidate's employment prospects. They interviewed the other top two ranked candidates from the other certificates, rather than attempting to bypass [redacted] just to access the applications of other non-preference candidates on the [redacted] certificate. They also moved forward in the hiring process of one of those candidates by checking references. The other two candidates were interviewed via telephone using the same question format as [redacted]

B. [redacted] reasonably believed [redacted] was not qualified for the position.

While [redacted] experience using business intelligence software and training in SQL appeared to satisfy the requirements of the vacancy announcement, e-mails and revised position descriptions show that [redacted] identified and communicated to HCMO before the hiring process that the selected candidate would need to be proficient in SQL before taking the position. Before advertising the vacancy, [redacted] and [redacted] added language to the position description that emphasized the incumbent's SQL proficiency, including, "Must have expert knowledge of a variety of applications including MS SQL Server..."

HCMO used this language to draft a vacancy announcement that conformed to HCMO's requirement that vacancy announcements not be restricted to a candidate's experience in one brand or product. [redacted] agreed to the vacancy announcement as drafted by HCMO. They interpreted several provisions of the vacancy announcement, and the selective factor language in particular, as strong language requiring the selected candidate to have experience, and not just training, with SQL. Such an interpretation is consistent with a reading of the vacancy announcement provisions in light of the revised position description. It is clear that [redacted] intent and understanding was to hire a candidate who was highly proficient in and could serve as the [redacted] point of contact for SQL. In addition, neither [redacted] that he needed to be certified in SQL in order to be considered for the position. Their intended and expressed basic qualifications for the position remained consistent before and during the hiring process.

C. The OIG could not determine the source of [redacted] understanding that they were to request a preference candidate to withdraw his/her application if they believed the candidate was not truly qualified.

[redacted] and [redacted] told the OIG that they understood they were to request a preference candidate withdraw his/her application if they determined that he/she was not qualified for the position. In contrast, [redacted] said that HCMO never has advised selecting officials to ask a preference candidate to withdraw his/her application, nor is it FTC practice for selecting officials to make a unilateral determination that a candidate is not truly qualified.

The OIG did not find written policy, guidance, or any document identifying FTC's practice with respect to preference candidates. The OIG also did not find written policy, guidance, or any document indicating selecting officials could ask preference candidates to withdraw their applications. Therefore, the OIG could not determine the source of [redacted] and [redacted] understanding that they were to request a preference candidate to withdraw his/her application if they believed the candidate was not truly qualified.